THE TESTAMENT OF LAST WILLES,

Very profitable to be vnderstoode of all the ſ… Realme of England, (desirous to know, *Whether, …* they may make their Testaments: and by what meanes … be *effected* or *hindered*,) and no lesse delightfull … rarenes of the worke, as for the … stile, and metho…

Compiled of such lawes Ecclesiastic… the lawes, customes, or ſ… gatorie to the Prer…

In which Treatise also are inserted … ther with mention of sundrie cu… Particular, not impertinent …

Besides diuers Marginall notes, and Quotations not to be … ally of Iustinianists, or young Students of the Ciuil …

With two Tables, the one Analyticall, *describing the … tise: The other* Alphabeticall, *discouering the …*

By the Industrie of Henrie …burn, Bachelor …

2. Kings 6. 20.

Put thine house in order, for thou shalt die and …

Printed …

HW-0 11-9-21 200

TO THE MOST REVEREND FATHER IN GOD, IOHN, BY GODS PROVIDENCE Archbiſhop of Yorke, Primate of England, and Metropolitane: H. S. wiſheth true felicitie now and euer.

WHen I had finished this briefe Teſtamẽtarie treatiſe, bethinking vvith my ſelfe (moſt reuerende Father,) vnto vvhoſe patronage I might dedicate the ſame: In the end I did reſolue to make an offer thereof vnto your Grace: Being moued thereunto vvith the conſideration, partlie of mine ovvne duetie, partlie of your Graces intereſt. For being a member of your Graces Courts Eccleſiaſtical, and hauing

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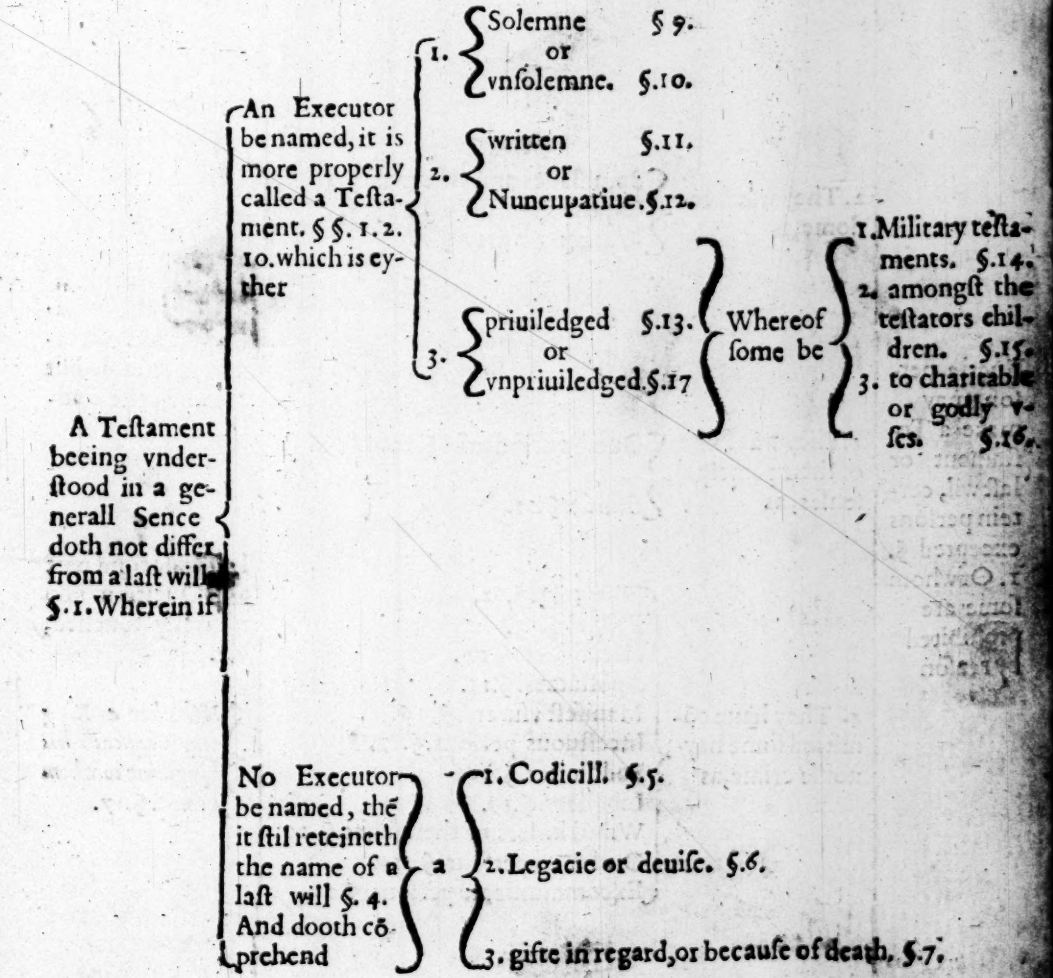
nowe receiued ſundrie good fauours at your honours handes : This I thought might fitly ſerue for a probable argument of my thankfulneſſe in that behalfe. And on the other ſide, foraſmuch as before all others within this prouince of Yorke, it appertaineth principally vnto your grace, to prouide that teſtamẽts lawfully made, be dulie executed, being nowe by Gods merciful prouidẽce Metropolitane & ordinarie of that ſea, I could not ſee a more worthie Patrone for a teſtamẽtary worke. Partly therefore by theſe former conſiderations, but eſpecially I was encouraged therunto with the cõtemplation of thoſe diuine graces of piety, learning, zeale, grauitie, bountie, benignitie, affabilitie, and al maner not onely ſufficiencie, but excellencie of vertuous giftes, wherewith the giuer of all goodneſſe hath wonderfullie enriched your honourable minde. Wherefore as hitherto your wiſdome hath bene accuſtomed to entertaine with comfortable countenance, ſuch as be ſtudious to benefite either the Church, or the common wealth, though otherwiſe they bee of ſmall reputation: ſo nowe (moſt reuerend) I am with all duetie to craue the con-

continuance of the ſame in mine ovvn behalfe, together vvith the ſauourable protection of theſe my labors, ſo farre as they bee agreeable to truth, right and equitie: vvhich thing I doo ſo much the more humblie deſire, by hovv much I may ſeem ouermuch aduenturous in making choiſe of ſo honourable a patrone, for ſuch a trifling treatiſe. The Lorde of might and mercie multiplie his ſpirite vppon your grace, to the aduauncement of his ovvne glorie, and the good of his Church, vvith encreaſe of manie yeares in health and happineſſe.

Your Graces moſt readie
at commaundement,
H. Swinburne.

A Table of the firſt part, wherein is ſhewed what a Teſtament or laſt will is: and how manie kindes *of Teſtaments there bee.*



A Table of the ſecond parte, wherein is declared who may make a Teſtament, and who may not.

Euerie perſon may make a Teſtament or laſt wil, certein perſons excepted. §. 1. Of whom ſome are prohibited by reaſon

1. They want diſcretion, as
- Children. §. 2.
- Madfolkes. §. 3.
- Idiotes. §. 4.
- Oldmen childiſh. § 5.
- He that is drunke. §. 6.

2. They wãt freedome, as
- Bondſlaues and villeynes. § 7.
- Captiues and priſoners. §. 8.
- Women couerte. §. 9.

3. They wãt ſome of their principal ſenſes, as
- Dumbe and deafe. §. 10.
- Blinde. §. 11.

4. They haue cõmitted ſome haynouſe crime, as
- Traytors. §. 12.
- Felons. §. 13.
- Hereticks. §. 14.
- Apoſtataes. §. 15.
- Manifeſt vſurers. §. 16.
- Inceſtuous perſons. §. 17.
- Sodomites. §. 18.
- Libellers. §. 19.
- Wilful killers of themſelfes. §. 20.
- Outlawed perſons. §. 21.
- Excommunicate perſons. §. 22.

5. Certein legall impediments, as
- Prodigall perſons. §. 23.
- He that ſweareth not to make a Teſtament. §. 24.
- He that is at the very point of death. §. 25.
- Eccleſiaſticall perſons. §. 26.

[redacted] kinde of [redacted] the greater part are not vterly inteſtable, but in ſome caſes onely.

In the ſecond part of this Queſtion alſo is briefly touched, viz.

- *Whether a King may bequeath his kingdome to whom he will.* §. 27.

A Table of the third part describing what things, and how much may be disposed by will.

If we would know,

- What thinges may be disposed by will. If we regard
  - 1. Lands, tenements, and hereditamentes: they are not deuiseable but in certeine cases. §.2. Whereof some are approued by
    - 1. Custome, viz. when the lãds are holden in
      - 1. Gauelkinde. §.2.
      - 2. Burgage tenure. §.2.
    - 2. Statutes, viz. when the lãds are holden in
      - 1. Socage tenure. §.3.
      - 2. Knights seruice. §.3.
  - 2. [illegible] & cattels are [illegible], except certain cases. §. 5. As when those things bequeathed ar such, as
    - 1. The testator hath iointly with an other.
    - 2. The testator hath as administrator.
    - 3. The goodes of the realme, viz. of the auncient Crowne, and Iewels.
    - 4. Which belong to anie { Colledge. Hospitall. Citie. Church. }
    - 5. Descend to the heire and not to the executor.
    - 6. Belong not to the testator but to an other.

    } §.6.
  - 3. Cõmitting of the [illegible]on of childrẽ especially within the prouince of Yorke. Concerning which thing diuerse questions are examined, viz.
    - 1. Who may appoint a tutor. §. 9.
    - 2. To whom a tutor may be appointed. §. 10.
    - 3. Who may be appointed tutor. §. 11.
    - 4. In what manner a tutor may bee appointed. §. 11.
    - 5. What is the { office / authoritie } of a tutor. §. 13.
    - 6. By what meanes the tutorship is ended. §. 14.
- How much may be disposed by will. If we respect
  - 1. Lands, tenements & hereditaments holde } in { 1. Socage tenure, all / 2. Knights seruice 2. parts of 3. } is deuiseable. §.15.
  - 2. Goods, then in case the debts due by the testator, do
    - 1. Exceede his goods and cattels: The testator cannot bequeath any thing in preiudice of his creditors. §. 16.
    - 2. Not exceede his goods & cattels, but that somewhat doth remain cleare the debts & funerals deducted. Of these cleare goods if there be
      - 1. No custome, all is deuiseable. §.
      - 2. Any custom (as there is within the prouince of Yorke & in diuerse other places.) If the testator haue
        - 1. wife & chil[illegible] dre the third part
        - 2. wife alone [illegible] child [illegible] the [illegible]
        - 3. [illegible] [illegible]

A Table of the fourth part, decyphering the formes of Testaments.

1. General to all Testaments. §.1. And of these som do apperteine to the
   - 1. Essence thereof, as the nanning of an Executor. §. 2. who may be appointed
     - 1 Simplie (§.4.) or conditionally (§.5.)
     - 2 To a certein time or (§.17 frō a certein time
     - 3 Vniuersally or particularly (§.18
     - 4 In the first degree or (§.19 in the 2. 3. &c.
     - 5 Alone or (§ 20 with others.

   Concerning euerie which kinde or forme of making an Executor diuers thinges are considered, especially cōcerning the cōditionall assignation of an executour these things are examined *viz.*

   1. *What it is, & what woords do make the dispositiō to be conditionall.*
   2. *How many kinds of conditions there be.*
   3. *What is the effect of a condition.* §.6.
   4. *Whether euery possible cōdition ought to be obserued precisely.* §.7.
   5. *Whether the condition be accompted for accōplished, when it doth not stand by the executor or legatary, wherefore the same is not accomplished.* §.8.
   6. *Whether he that is executor or to whom any legacy is bequethed cōditionally, may in the meane time whiles the condition depēdeth, be admitted to the executorship, or obteine the legacie by entring into bonds to perform the condition, or els to make restitution.* §.9.
   7. *Whether it bee sufficient that the condition was once accomplished though the same doo not continue.* §.10.
   8. *How farre those conditions whereby the libertie of making testaments is hindred, be lawfull or vnlawfull.* §.11.
   9. *How farre those conditions are lawfull or vnlawfull, wherby the libertie of mariage is hindred.* §.12.
   10. *How far those conditions are lawfull, which doo prohibite alienation.* §.13.
   11. *Within what time the cōdition may or ought to be performed, no certeine time being limited by the will.* §.14.
   12. *Of the vnderstanding of this condition,* If he die without issue. §.15.
   13. *What order is to be taken concerning the administration of the goods of the deceased, whiles the condition of the executorship depēdeth vnaccomplished.* §.16.

   - 2. Apparance thereof, that is to say, due proofe, which is to be made by witnesses / writing §.21.

2. particular or peculiar to some kind of Testaments. *viz.* Of a
   - 1 Solemne testament. §.23.
   - 1 vnsolemne testament. §.24.
   - 2 Written testament. §.25.
   - 2 vnwritten testament. §.26.

Who maie be Executor, and is capable of a Legacie.

Euerie perſon may bee Executor and is capable of a Legacie; certeine perſons excepted. §.1. viz.

- Whoſoeuer cãnot make a Teſtament by reaſon of ſome crime by him committed §.2.
- A Baſtard. §.7.
- An vnlawfull Colledge. §.9.
- An vncertaine perſon. §.10.

Of which perſons ſome are not vtterly incapable, but in ſome caſes onely.

The office of an executor testamẽtarie is first to deliberate and resolue, either to accept or to refuse the executorship. §.1. wherein for his better instruction, amongst other things (*vt in.§.2.4*) he is to cõsider the estate of

1. the testator; and therin especially what goods and cattles did belong vnto him, and what debts he did owe, and whether he were executor or administrator to an other. §.3.

2. Himself, namely whether for his skil, diligẽce & fidelity, he be able and fit to vndertake the office. §.3.

3. Others with whom he is to deal chiefly of his coexecutor, if any be.

which thinges cõsidered if he resolue to

1. vndertake the executorship: Thẽ it doth belong to his office, to

1. Cause an inuentary to be made: wherein these things are needfull to be knowẽ, viz.

1. *whether it be of necessitie that an Inuẽtary be made.* §.6.
2. *what things are to be put into the Inuentary.* §.7.
3. *within what time the Inuentary is to be made.* §.8.
4. *what forme is to be obserued in making of the Inuentary.* §.9.
5. *what are the benefits and effects of an Inuẽtary.* §.10

2. Procure the will to be prooued: wherin it behoueth the executor to know;

1. *Before whom the Testament is to bee prooued.* § 11.
2. *By whom.* §.12.
3. *When.* §.13.
4. *In what forme.* §.14.
5. *What fees are due in this behalfe.* §.15.

3. Paie debts, legacies, & Mortuaries. And here he is to learne

1. *How farre the executor is bound to pay debts and legacies.* §.16.
2. *Which debts are first to bee discharged: In case there be not sufficient to pay all.* §.16.
3. *How muche is due for Mortuaries.*

4. Make an accõpt And here he is to be aduertised

1. *How needfull it is.* §.17.
2. *To whom it ought to be made.* § 18.
3. *When.* §.19.
4. *In what manner.* §.20.
5. *What is the end and effect thereof.* §.21.

2. Refuse the executorship: Thẽ he must beware that he doo not administer as Executor:

viz. He must not do any act which is proper to an executor, as to receiue the testators debts, or to giue acquitances for the same, &c. But other actes of charitie or humanitie, as to dispose of the testators goods about the funerals, to feede his cattell least they perish, to keepe his goods least they be stolen: These things may bee done without danger.

A Table of the laſt parte, ſhewing by what meanes Teſtaments or laſt willes become voide.

Sometimes the Teſtament

1. euen frō the beginning is ether void or voideable, wholy or in parte, by reaſon

- 1. The teſtator is ſuch a perſon as cannot make a Teſtament.
- 2. The things bequeathed are not deuiſeable.
- 3. The forme of the diſpoſition is vnlawfull.
- 4. The executor or legatarie is incapable of the executorſhip or Legacie.

§.1.

- 5. Of feare. §.2.
- 6. Of fraude. §.3.
- 7. Of immoderate flatterie. §.4.
- 8. Of Errour. In which caſe wee are to diſtinguiſh whether the Errour doo reſpect the
  - perſon, name, qualitie — of the executor or legatarie. §.5.
  - name, ſubſtance, quantitie, qualitie — of the thing bequeathed. §.5.
- 9. Of vncerteintie, wherein it is materiall whether this vncerteintie, haue relation to the
  1. Executor or legatarie. §.7.8.
  2. The thing bequeathed. §.10.
  3. Date of the teſtament. §.11.
- 10. Of imperfection, which is either in reſpect of
  1. ſolemnitie.
  2. will.

  or — §.12.
- 11. The teſtator hath no meaning to make his laſt will, as when he ſpeaketh
  - vnaduiſedly.
  - ieſtingly.
  - boaſtingly.

  §.13.

2. Being good at the beginning is afterwards made voide, eyther in reſpect of

1. The whole teſtamēt, as by
   1. a later teſtament. §.14.
   2. reuoking
   3. cancelling

   the teſtament made. §.15. §.16.
   4. alteration of the ſtate of the teſtator. §.17.
   5. forbidding or hindering the teſtator to make an other Teſtament. §.18.
   6. refuſall of the executorſhip, §. 19.

2. Particular legacies only: which thinge doth happen by diuerſe meanes, whereof ſome haue relatiō to
   1. the fact of the teſtator, as by
      1. ademption
      2. tranſlation

      of legacies §§. 20. 21.
   2. the fact of the legatary, as if the legatary
      1. become enimie to the teſtator.
      2. accuſe the teſtament of falſitie.
      3. refuſe to performe the charge impoſed in reſpect of the legacie.
      4. apprehend the legacie of his owne authoritie.

      §. 22.
      5. die before the legacie be due. §.23.
   3. other occaſions, eſpecially if — the thing bequeathed be deſtroied. §.24.

so that no child or children be not heire
or advanced by him in his life tyme for more
no goodes of no deceased and to be
devided into two equall partes of the whole
wife to have one halfe & no other halfe
remaineth to be disposed by no testator
and if no testator have wife & children
no heire, and no heire & another advanced
& found not advanced by their father in
his life time in his said no goodes of
no deceased and to be devided into
two equall partes of no wife shall have
one & no child or children not advanced
another & no heirs shall have in no power of
no testator to be disposed by his will

Peter Ordinary his
Booke Copthorne
March 8th 1602

To the Reader.

GReat and wonderful is the rumber of the manifolde writers of the Ciuill and Eccleſiaſticall lawes, and ſo huge is the multitude of their ſundrie ſorts of bookes; as lectures, councels, tracts, deciſions, queſtions, diſputations, repetitions, cautels, clauſules, common opinions, ſingulars, contradictions, concordances, methodes, ſummes, practickes, tables, repertories, and bookes of other kindes (apparant monuments of their endleſſe and inuincible labours) that in my conceite, it is impoſsible for any one man to read ouer the hundred part of their works, though liuing an hundred yeeres hee did intende none other worke. Wherfore by the publiſhing of this teſtamentarie treatiſe, I may be thought to powre water into the Sea, to carrie owles to Athens, and to trouble the reader with a matter altogether needleſſe and ſuperfluous: But yet for all this, in caſe this one litle booke may ſerue in ſteed of many great volumes; then I hope that in the equal iudgement of ſuch as be indifferently affected, the ſame is rather to be admitted as commodious, then reiected as ſuperfluous.

And nowe, beleeue me, (gentle reader) I haue deſired earneſtly and endeuoured carefully (according

yo heir yo child or children be not heird
or advanced by him in his life time for him
yo goods of yo deceased and to be
devided into two equal parts of yo testators
part to be had one calfe & yo oxe calfe
remaineth to be disposed by yo testator
and if yo testator have wife & children
equally, one to have & another advanced
& some not advanced by their father in
his life time in yis case yo goods of
yo deceased and to be devided into
two equal parts of yo wife shall have
one & yo child or children not advanced
another & yo heir shall have in yo power of
yo testator to be disposed by his will

Peter ordinary his
Book of Thornmore
March 1683

To the Reader.

GReat and wonderful is the number of the manifolde writers of the Ciuill and Eccleſiaſticall lawes, and ſo huge is the multitude of their ſundrie ſorts of bookes; as lectures, councels, tracts, deciſions, queſtions, diſputations, repetitions, cautels, clauſules, common opinions, ſingulars, contradictions, concordances, methodes, ſummes, practickes, tables, repertories, and bookes of other kindes (apparant monuments of their endleſſe and inuincible labours) that in my conceite, it is impoſsible for any one man to read ouer the hundred part of their works, though liuing an hundred yeeres hee did intende none other worke. Wherfore by the publiſhing of this teſtamentarie treatiſe, I may be thought to powre water into the Sea, to carrie owles to Athens, and to trouble the reader with a matter altogether needleſſe and ſuperfluous: But yet for all this, in caſe this one litle booke may ſerue in ſteed of many great volumes; then I hope that in the equal iudgement of ſuch as be indifferently affected, the ſame is rather to be admitted as commodious, then reiected as ſuperfluous.

And nowe, beleeue me, (gentle reader) I haue deſired earneſtly and endeuoured carefully (according

to the measure of such slender skil as God hath vouchsafed me, and as conuenient leisure from other occasions of needfull profite and healthfull disport haue permitted,) that this one litle booke which heere I do present vnto thy courteous handes, may stand in steed of many bigger bookes.

The causes wherefore the Author of this booke vndertooke this worke.

For whereas by the supreme authoritie and inuiolable power of the high court of Parliament, holden in the xxv. yeere a) *of the reigne of the most renowmed King of this lande* Henrie *the eight, of famous and happie memorie: It was enacted and established (amongest other Statutes then made, and since that time reuiued in the first yeere of her Maiesties* b) *most gracious reigne that nowe is) that such lawes ecclesiasticall being then alreadie made, which bee not hurtfull or preiudiciall to the prerogatiue roiall, nor repugnant to the lawes, statutes, and customes of this Realme, shall still be vsed and executed as they were before the making of that acte, vntill such time as they were viewed, searched, or otherwise ordred or determined by two and thirtie persons, or the more part of them, according to the tenour, fourme and effect of the saide acte: Which lawes so established, reuiued, and confirmed, and not without good cause, and deepe consideration (in diuerse statutes, made during the reignes as well of the saide most noble king* Henrie *the eight* c), *as of the most godly prince* Edwarde *the sixt* d), *are termed or intituled, for the more honorable account thereof, with the reuerend and sacred name of* the Kinges ecclesiasticall lawes: *Like as in those countries and Churches of* Germanie, *which haue receiued the Gospell, the Canon lawe is admitted and obserued so farre foorth, as it is not repug-*

a) Stat. H. 8. an. 25. c. 19.

b) Stat. Eliz. an. 1. c. 1.

c) Stat. H. 8. an. 27. c. 20. & an. 32. c. 7.

d) Stat. Ed. 6. an. 2. c. 13.

nant

nant to the newe Teſtament[c], *and is at this day the Eccleſiaſticall law of their conſiſtories.*

Whereas alſo the Ciuill law euer ſince the Eccleſiaſticall law was made, had beene deemed and iudged for part and parcell of the ſame Eccleſiaſticall law, in caſes wherein it dooth not differ from the ſame[f]*: For where theſe two lawes be not contrarie, the one is ſuppletorie of the other, and being mutually incorporated doo both make one bodie*[g]*, otherwiſe the Ciuill law being contradicted by the Eccleſiaſtical law, ought to be ſilent in the Eccleſiaſticall court*[h].

And foraſmuch as theſe foreſaide lawes, haue not as yet beene viewed, ſearched, or otherwiſe ordered or determined by xxxij. perſons, or the more part of them, according to the forme and effect of the foreſaide act of Parliament: which thing neuertheleſſe hath beene (I confeſſe) attempted[i]*, yet not ſo fully effected, but may bee and that ſhortly if God vouchſafe proſperous ſucceſſe to that notable and profitable worke of that graue and learned man* Doctor Percie, *now well towardes accompliſhment.) By occaſion of which defect of the viewe, examination, order, or determination of the ſaide two and thirtie perſons, thoſe Ciuill and Eccleſiaſticall lawes teſtamentarie not repugnant to the lawes, ſtatutes and cuſtomes of this Realme, are yet (euen as hither to they haue beene) ſcattered and diſperſed here and there, and ſecretly hidden from the ſubiects of this realme in corners of many bookes of ſtraunge Countries, and forreine language, intangled alſo and incombred with long diſcourſes of farre different argument, and no leſſe number of lawes vtterly impertinent to the gouernment of this common wealth: ſo that the knowledge thereof*

c) Schuedinus Tract. de nuptijs. part. 4. tit. d diuort. n. 13 fol. 48.

f) c. 1. de no. op. nun. c. clerici. de iud. extra. c. ſi in auditorium. diſt. 10. §. ſi vero eccleſiaſticum, in Auth. vt clerici apud. propr. Epiſcopos.

g) Panor. in d. c. 1. de no. op. num. Valquius. de ſucceſſ. creat. lib. 3. §. 26. n. 70. Benedict. Capra. Theſaur. com. op. verb. leges. fol. (mihi) 403. n. 23.

h) d. c. 1. de no. op. nun. gloſſ. in c. 2. de arb. lib. 6. Are. in d. c. clerici de iudic. extra. quæ ſententia communiter approbatur, teſte Benedict. Capra. vbi ſupra

i) Videlicet, per Gualt. Haddon, legum Doctorem conſultiſſ. (& omnium quos vnquã tulit Anglia legiſtarũ diſertiſſimum. lib. de Reformatione legum eccleſiaſtic.

howsoeuer admirable and worthie to be learned of all, cannot (as the case nowe standes) be so commodious to many, as the expenses to be consumed in bookes would be onerous, and the trauaile to be emploied in the studie thereof would be tedious.

The summe of all the contents of this booke

These premised causes considered, I thought it not onely not superfluous, but expedient for this common wealth, to make collection of the most principall lawes, Ciuill and Ecclesiasticall, perteining to testaments made before the xxv. yeere of King Henrie *the eight, I meane of those ciuill lawes which bee not contrarie to the Ecclesiasticall lawes, and of those Ecclesiasticall lawes which bee not any way preiudiciall or hurtfull to the prerogatiue royall, nor repugnant to the lawes, statutes, or customes of this realme: but agreeing peaceably amongest themselues, and as shaking handes together like friends, and like louing brethren, saluting and embracing each other; may now still be executed as they were before the making of the saide act. Amongest which lawes Ciuill and Ecclesiasticall, I thought good likewise (as iust occasion should be offered, and as the opportunitie of the place fitted) to insert such statutes of this realme, and to make mention of such customes, as well generall as particular, as be not impertinent thereunto.*

The ende and vse of this booke.

To this ende and purpose especially, that euerie subiect of this realme, though he be but of meane capacitie, may with little labour, and lesse charge, take a sensible view (as in a glasse) of those Ciuill and Ecclesiasticall lawes testamentarie now in force, and to be obserued and executed in the Ecclesiasticall courtes within this Realme of England (the same being now by Gods mercifull goodnesse reduced into a narrow compasse) the

the which before coulde not bee done without great charge and difficultie.

And albeit this be the ſpeciall marke whereat I haue aimed, and the chiefe ſcope of this teſtamentarie treatiſe, namely, to benefite thoſe ſubiects of this Realme, which heretofore haue bene ignorant of the Ciuill and Eccleſiaſticall lawes: neuertheleſſe if I be not deceiued, this treatiſe being diligently peruſed, together with the quotations and marginall notes thereunto adioined, may in ſome ſort be profitable to thoſe Iuſtinianiſts, or yong ſtudents of the Ciuill law, who do intend to beſtowe the fruit of their ſtudie in the practiſe thereof, to the benefite of this common wealth. At leaſt if no other vſe can be made thereof, yet happily it may ſerue them as a directorie, whereby they may vnderſtande what lawes teſtamentarie are now in force within this Realme of England, and conſequently, what titles of the auncient lawes, Ciuill or Eccleſiaſticall, deſerue to be read with more diligence, leaſt otherwiſe not knowing to make choiſe of the more vſuall lawes, or titles, they beſtow equall trauaile in the ſtudie of lawes not equally neceſſarie. Another vſe of this booke.

Moreouer, I coniecture that vnto theſe Iuſtinianiſts it would haue beene much more acceptable, (peraduenture alſo to my ſelfe more commendable) to haue ſet foorth this Treatiſe in the Latine tongue, wherein the lawes Ciuill and Eccleſiaſticall, as they be originally written: ſo are they very elegantly and ſententiouſly compact; and now by the tranſlation thereof into our vulgar tongue, either loſe ſomething of their former vertue, or of their naturall beautie and grace. Neuertheleſſe, after I had conſidered that by following this plauſible courſe, I ſhould pleaſure but a The cauſe of publiſhing this booke in our vulgar tongue.

fewe

fewe in comparison of the rest, whom otherwise I might happily benefite: Albeit I had once begunne, and laid the foundation of the whole tract, in such tearmes as I found it deliuered by others, preferring publique commoditie before particular vtilitie, or mine owne commendation (in case it be lesse commendable, rather to seeke the benefite of the common wealth, then to hunt after priuate praise) I did easily alter my former purpose.

That lawes transformed from their natural shape, must needs in some sort be either damnified or disgraced, I do not thinke to be perpetually true: But if it be a thing so necessarily incident to all translations, that it cannot be auoided, it ought therefore to be the rather tolerated.

Sufficeth it therefore these Latin Iustinianists, that those marginall notes especially proper to their studies, be left in Latin: The rest, because it belongeth to all, meete it is that it be written in such a language, as may be vnderstood of all.

Inter causam finalem & impulsiuam quid interest præclare Tiraquellus, in regulam cessante causa, &c. limitac. prima.

Thus (courteous reader) I haue discoursed vnto thee, the end wherefore I vndertooke this labour, the cause which mooued me so to do, and wherefore I haue published the same in the vulgare tongue. Now it resteth that I craue thy fauourable acceptance of my good will, and endeuour, which if thou shalt vouchsafe to bestow, I shall not onely thinke my selfe sufficiently recompensed but greatly enriched.

Thine most willingly to his vttermost power, *Henry Swinburne.*

The principall parts of this Booke.

BEing at last resolued (in regard of the benefite of this common wealth) to set forth this treatise of testaments in our vulgar tongue, I thought it meete that the methode should be suteable to the stile: that is to say, plaine and familiar. Whereupon it seemed vnto me most conuenient, to distribute the whole treatise into these parts following.

1 In the first part is shewed what a testament or last will is: and how manie kindes of testaments there be.

2 In the second part is declared what persons may make a testament, and who may not.

3 In the third part, what things, and how much may be disposed by will.

4 In the fourth part, how or in what maner testaments or last wils are to be made.

5 In the fift part, what persons may be appointed Executors, and who be incapable of an executorship or legacie.

6 In the sixt part, is set downe the office of an executor.

7 In the last part is examined by what meanes testaments or last willes become voide.

third sorte of privileged testam. Testim militare
testim inter liberos. et Testim ad pias causas. cap. 13

of a Military testam.

A soldyer may dyse with two testamts & Gode wyll. The
man dieth wholy testate & wholy intestate. And therefore
if he make a will & appointe an Executor for goodes in
one place, the next of kin shall have administracion
of goodes in another place 1a Eliz cap 14.

there be 3 sorte of soldyers Milites armati Milites
literati et Milites rectores viz regis. Mon
No soldyer having scripte in a testo, nor Gentleman
trayned Militarie exhibitum, but onely sue abar
in actions. Likewise no Doctors Attorny non
proficient, or deale villanously non residunt
but sue ad painfully attend their profession and
diligently labo in their vocations 20th cap.

Definition of a legacie

A legacie is a guifte left by the deceased to be paid
or performed by the Executor in deede. cap 6to
And therefore it is not lawfull for the Regulary to take
his legacie by his owne sole authoritie, wch if he
p[er]forme to the hole, the same except in ultimo
testo whereof hereafter part 7a cap 22. in fin.

THE FIRST PARTE OF THIS TESTAMENTARIE TREATISE.

WHEREIN IS SHEWED WHAT *is a Testament or last Will, & how many kinds* of Testaments there be.

The Paragraphes, or Chapters of the first parte of this Treatise.

Hether a Testament, and a last will, be both one thing, and of the manifolde signification of this word Testament §.1.

The definition of a Testament §.2.

An exposition of the same definition §.3.

The definition of a last will §.4.

The definition of a Codicill §.5.

The definition of a Legacie §.6.

The definition of a gift in regarde, or because of death §.7.

The diuision of Testaments §.8.

Of a ſolemne Teſtament §.9.
Of an vnſolemne Teſtament §.10.
Of a written Teſtament §.11.
Of a nuncupatiue Teſtament §.12.
Of priuiledged Teſtaments §.13.
Of a militaric Teſtament §.14.
Of the fathers Teſtament amongſt his children §.15.
Of a Teſtament ad pias cauſas §.16.
Of vnpriuiledged Teſtaments §.17.

A BRIEFE

A briefe Treatiſe of Teſtaments, *and laſt Willes, &c.*

The firſt part of this treatiſe.

Whether a Teſtament and laſt Will be both one thing, and of the manifould Acceptance of the word Teſtament.

1 *NO vſe of ſolemne teſtaments heere in England.*
2 *A teſtament and a laſt will haue diuers definitions.*
3 *Teſtament, taken generally and ſpecially.*
4 *The generall ſignification of this word Teſtament.*
5 *Teſtament, taken generally, doth not differ from a laſt will.*
6 *Laſt Will, is a generall word, comprehending all kindes both of laſt willes and Teſtaments.*
7 *A Teſtament, according to the definition thereof, is one kind of laſt will,* viz. *wherein an Executor is named.*

§. j.

IT may ſeeme, that a teſtament and a laſt will be both one thing, and that there is no difference betwixt the one and the other, at leaſt heere in England;

land; becauſe wee † haue no neceſſarie vſe (*a*) of 1
thoſe ſolemne teſtaments, in the making wher-
of, the preſence of vij. witneſſes, together with
the obſeruation of many moe ceremonies, is 2
neceſſarily requiſite by the Ciuill lawe. (*b*)

On the contrary, it ſeemeth that they are not
both one; partely becauſe they haue diuerſe
names, which doth import diuerſitie of things;
(*c*) eſpecially becauſe † they haue differẽt defi- 2
nitiõs: for it is receiued for an infallible *Axiome*,
that the definitions being different, the things
defined are diuerſe. (*d*) As for the former rea-
ſon, it may be thus anſwered. That albeit our
Teſtaments be vnſolemne; yet it doth not fol-
low that therefore we haue no teſtaments, or
that our teſtaments are therefore meere laſt
willes. For an vnſolemne teſtament is a teſta-
ment, and that properlie or in ſtrict interpreta-
tion, as hereafter ſhall be confirmed, when wee
ſhall ſpeake of vnſolemne teſtaments. (*e*) And
ſo the concluſion ſeemeth rather neceſſary then
probable, that a teſtament and a laſt will are not
both one, but different. Notwithſtanding, this
concluſion is not ſimply or perpetually true, for
in ſome reſpects they are both one, though in
other reſpects they differ.

Vnderſtand therefore, that † a teſtament may 3
be taken two manner of wayes; largely, and
ſtrictly. (*f*) It is ſaid † to be taken largely or ge- 4
nerally, when the ſignification of the bare name
or word Teſtament, (which in Latin is *Teſta-
mentum*) is had in conſideration. (*g*) This word
Teſtamentum, is as much as *Teſtatio mentis*, (*h*)
that

(a) Tract. de repub. Ang. lib. 3. cap. 7. Lindewood in c. ſtatutum verb. probatis. Tit. de Teſtam. lib. 3. prouincial. conſtit. cant. Bracton, de legib. & conſuetud. Angl. lib. 2. c. 26. verb. fieri autem. Haddon lib. de reforma. Legum eccleſiaſt. Angl. Tit. de Teſta. ca. 2. Peckius in c. priuilegium de reg. iur. 6.

(b) L. Hac conſultiſſima C. de Teſta. §. ſed cum paulatim Inſtit. de Teſta. ordin. & infr. ead. part. §. ix.

(c) L. ſi idem C. de Codicil.

(d) Euerar. & Olden. loco. a definitione.

(e) Infra ead. part. §. x.

(f) Bar. in L. j. C. de ſacr ſanc. eccleſiaſt. col. pen. Gloſs. in L. j. ff. de Teſt.

(g) Gloſſ. & DD. in d. j. ff. de Teſta.

(h) Lib. 2. inſtit. Tit. de Teſta. ord. in princ.

that is to ſay, a teſtifying or witneſſing of the minde. So writeth the worthy Emperour *Iuſtinian*, after *Sulpitius*, (*i*) Which deduction others (without cauſe I cõfeſſe, yet not without ſcofs) doe ſharply reprehend. (*k*) As though forſooth, *Iuſtinian* or *Sulpitius*, had contended to deliuer the very Etymologie of the worde Teſtament, and not a certaine Alluſion rather of the voice
5 onely. (*l*) When this † word Teſtament is vttered in this generall ſence, it differeth not from a laſt will; (*m*) and any laſt will, be it a Codicill, or other kinde, may bee ſo tearmed a Teſtament, that is to ſay, a teſtifying, or declaring of the minde. (*n*) And hence it is that not only in our ſpeach, but in our writinges alſo, wee vſe the tearmes of *Teſtament* and *Laſt will*, indifferently, or one for another.

It is taken ſtrictly, when it is accepted according to that definition inuented by *Vlpianus*, (*o*) hereafter enſuing (*p*) and being taken in that ſence, it differeth from a laſt will, (*q*) yet not as oppoſite thereunto, but as the *ſpeciall* differeth from the *generall*, (*r*) for euery Teſtament is a laſt will, but euery laſt will is not a Teſtament.
6 To ſpeake more plainly thus they differ, A † laſt will is a generall word, and agreeth to euery ſeueral kind of laſt will or teſtamẽt: (*s*) But a teſtament † properly vnderſtoode, is one kinde of
7 laſt will, euen that wherein *Executor* is named. For by the naming of an Executor it differeth from the reſt. (*t*)

(i) Couar. in Rub. de Teſt. ord. ex. j. par. n. r.

(k) Nempe Aul Gel. & Lau. Valla, acerrimus Latinæ linguæ aſſertor, qui hanc deductionẽ liberõ ore derident: ille li. 6. c. 12. hic li. eleg. 6. c. 3. Quòd (vt aiũnt) nõ magis dicatur teſtamentũ a mẽte, quã calciamentũ, quã ſalſamẽtum quã ornamẽtũ &c

(l) Ita enim conantur hanc notam excuſare. Alciatus in L. Tabernæ ff. de verb. ſig. Couar. in d. rub. de teſt. ex. j. part. n. 2. Inter Etimologiam vero & alluſionem hoc intereſt, quòd illa in verbi veritate radicata rem ipſam potius quã vocem interpretatur. Iſta nuda quadam vocabuli ſimilitudine cõtenta, vocem magis quam rem refert. Oldẽ & Euerard. loco. ab Etimolog.

(m) Bar. in l. j. C. de ſacſan. eccle. col. pẽ. Bal. in L. omne verbum C. Com. de leg. & Lindw. in c. ſtatutum verb. vlt. vol. de teſt. l. 3. Protincial. conſtit. cant.

(n) Gloſ. in l. 2. de conſtitu. Pecu C. Bar. Bal. & Lind. vbi ſupr.

(o) L. j. ff. de Teſtam.

(p) §. Prox.

(q) DD poſt. gloſ. in d. l j. ff. de teſtam.

(r) DD. vbi ſupr. (s) Mantic. de cõiect. vlt. vol l. 11. tit. 7. vbi tradit quinque ſpecies vlt. vol quarum prima eſt teſtamentum. Simo de præt. de interp. vlt. vol lib. 2. dub. j. fol. 9. & Phil. Frãc in Rub. de teſt. lib. 6. qui locis prædictis alias inſuper ſpecies referũt. (t) infr. §. 3. n. 19.

The definition of a Testament.

1 *What a Testament is.*
2 *The definition of a Testament vnworthely reprehended.*

§. ij.

A Testament † is defined after this manner: *Testamentum est voluntatis nostræ iusta sententia, de eo quod quis post mortem suam fieri voluit.* (a) A testament is a iust sentence of our vill, touching that we would haue done after our death. 1

(a) L. j. de Test. ff.

Some † there be, who do censure this excellent definition to be defectiue, (b) though vnworthelie, (c) (but nothing can content a curious head) whose error is detected, and the definition susteined in the expositiō following. (d) 2

(b) Accurs. & Paul. de castr. in d. l. j
(c) Quam viz. definitionem. vtpote perfectissimam, nemini licere in controuersiam reuocare, refert Michael Grass. Thesaur. com. op §. Testam q j.
(d) nf. § prox. n. 19.

A briefe exposition of the former Definition.

1 *Definitions dangerous in Law.*
2 *The cause of this danger.*
3 *It is rare if the definition be so iust that it cannot be ouerthrowen.*
4 *A iust or perfect definition profitable to many purposes.*
5 *The occasion of this exposition.*
6 Iuste, *hath diuers significations.*
7 Iuste, *opposed to that which is wicked.*
8 *The Testator may not command any thing against iustice or equitie, &c.*

9 Iuste,

9 Iuſte, *taken for full, or perfect.*
10 *The teſtament muſt not be vnperfect.*
11 *Imperfection teſtamentary twofolde.*
12 *Teſtament vnperfect in reſpect of ſolemnitie.*
13 *What ſolemnities be requiſite in making of Teſtaments.*
14 *Teſtament vnperfect in reſpect of will.*
15 *Whether the teſtamēt being vnperfect in reſpect of will, be voyde.*
16 *A further meaning by the worde* Iuſte, *being taken for perfect.*
17 *Euerie perfect will is not a perfect Teſtament.*
18 *Their error detected who reprehende this Definition.*
19 *What maketh a teſtament to differ from other kindes of laſt willes.*
20 *Of the manifolde ſignification of this word* Sentence.
21 *Teſtaments ought to be made with deliberation.*
22 *Such as haue not the vſe of reaſon, cannot make a Teſtament.*
23 *Vnaduiſed ſpeeches make not a teſtament.*
24 *How it may be proued that the Teſtator had* animum teſtandi.
25 *Boaſting wordes doe not diſpoſe.*
26 *Two kindes of iudiciall ſentences,* Interlocutory *and* Diffinitiue.
27 *Contrarie effects of theſe two ſentences.*
28 *Teſtaments compared ſometimes to an Interlocutorie ſentence, ſometime to a Diffinitiue.*
29 *The will of the teſtator, the gouernor of the teſtament.*
30 *The meaning of the teſtator is to be ſought diligent-*

gently, and kept faithfully.

31 *Meaning to be preferred before words.*

32 *Feare and fraud make voyde the teſtament.*

33 *The Teſtator muſt be* ſui iuris.

34 *The teſtament not to be referred to another mans will.*

35 *How a teſtament doeth differ from other ſentẽces.*

36 *The Teſtament is of no force vntill the Teſtator be dead.*

§.iij.

DEfinitions † are ſaide to be dangerous in lawe, (*a*) the cauſe † may be attributed to the multitude of different caſes, (*b*) the penurie of apt wordes, (*c*) the weakenes of our vnderſtanding, (*d*) and the contrarietie of opinions. (*e*) For happely amongeſt ſuch aboundant varietie of thinges, either we cannot diſcerne the true eſſence thereof, (*f*) or we doo not aptly deliuer what we conceaue, (*g*) or els theſe perils being paſt, at leaſt in our owne opinions, yet are we ſtill ſubiect to the rigorous examination of all ſorts of men, and muſt abide the doubtfull verdict of the ſharpeſt wittes, and endure the dreadfull ſentence of the deepeſt iudgements. (*h*) And † it is rare (*i*) if at the laſt, after long and ſuperſtitious reuolution, one man at leaſt among ſo many ſubtile heads, and captious conceits, doe not eſpie ſome defect or exceſſe in the definition, wherby the ſame may 1 2 3

(a) L. omnis diffinitio de reg. iur. ff. vbi Accur. cum ſuis ſequacibus, definitionẽ pro regula ſumendã putauit. Sed probabilior mihi videtur Cagnoli, & aliorũ opinio, quòd lex iſta loquitur de definitione propriè & dialecticè ſumptâ.

(b) L. neque L. nõ poſſunt ff. de Legibus.

(c) L. 4. de præſ. ver. ff.

(d) L. 2. C. de vet. iu enucl. macagnanus. de cõmuni opinione in prin.

(e) c. quia diuerſitatẽ in prin. de cõceſ. præben. extr.

(f) Id quod nemo non fatetur eſſe difficillimũ Dec. Cagnol. & alij in d. L. omnis diffinitio.

(g) Quũ plura ſint negotia quam vocabula. L. 4. de præſcrip. verb. F.

(h) L. 1. § j. ff. de dolo. DD. in Rub. Sol. matr. ff. Sane vt mirum ſit videre, & ibi, & paſſim alibi, quomodo pugnãt inter ſe homines doctiſſimi in definiendis rebus. (i) Quod autẽ ſic ſcribitur. (Parum eſt &c.) in d. l. omnis diffinitio. ſic legitur a Budeo (Rarum eſt) quæ lectio facilius ſuaderi poteſt, quum aliàs maneat ſermo ſubobſcurus.

be

be ſubuerted.(*k*) Which thing if it come to pas, then like as when the captain is ſlaine, the ſouldiers are in danger to be diſcomfited; or as the foundation being ruinous, the building is in perill of falling: So the definition being ouerthrowen, all the arguments drawen frō thence, and whatſoeuer els dependeth thereupon, is in perill to be ouerturned. (*l*) No maruell then if definitions be reported to be dangerous.

But if contrarie to the common courſe, the
4 definition be ſo iuſt, ſo perfect, that it cannot be iuſtly reproued, (*m*) this † definition, beſides that it is not perilous, it is ſo profitable, and ſo neceſſarie, that from thence as from the roote, and fountaine, euery diſcourſe ought take his beginning; (*n*) the rather, for that thereby (amongſt many other benefites iſſuing from the definition, (*o*) the whol nature or ſubſtance of the thing defined, (which otherwiſe for the aboundance of the matter thereto belonging may ſeeme infinite) is plainly declared, and that in fewe wordes. (*p*)

5 Now therefore † leſt this notable and moſt

(k) Mantic. de coniect. vlt. vol. lib. j. tit. 4. in fin.

(l) Quod ſi definitionē pro regula intelligendam ſentias cū Accurſio, vnde quæſo illa magna periclitatio ſubueiſionis? Eſto enim tot quaſi milites occidi quot patiatur exceptiones regula. At horū dux interim (nempe ipſa regula) non ideo proſternitur, immo firmat exceptio regulam in non exceptis, ita vt probè cōtra ſeipſū hac ſimilitudine fretus diſputat Accurſius, dum admoneat vt quiſque ſtet firmus regulæ, velut Bononienſis Carotio, licet aliqui capiantur de eius cuſtodibus: Et ſic licet aliqui caſus a regula ſubtrahantur, reſpondeatur (inquit) hoc eſſe ſpeciale, & ſic regula erit firma in nō exceptis. Hæc ille in gloſſ. in d. L. omnis diffinitio. Quod nihil aliud eſt quam ſi dixiſſet, Regula lædi quidem poteſt, ſubuerti non poteſt. Quare quum definitio de qua hic agitur, adeo ſit ſubiecta periculo, vt omnino ſubuerti poſsit, certè non magis erit regula, quàm illud neſcio quod (Carolum Bononienſe) eſt definitio.

(m) Nempe quòd ſingulos complexa caſus conuertatur cum definito. Id quod vel neceſſarium eſſe ad conſtituendam legitimam definitionē contendit acriter Cagnolus, contra cōmunem, immo negans contrariam eſſe cōmunem in d. L omnis diffinitio. (n) Cic. lib. j. offic. quod tamen Cagnolus intelligit de definitione Nominis, non Rei. Cuius ſi vera ſit opinio, & nos id ipſum obſeruauimus, dum quid, & quotuplex ſit hæc vox Teſtamentum ſuperiùs tradidimus. (o) Vt argumentationes, quæ ſæpiſſimè a definitione deducuntur, quarum quanta ſit vis & vtilitas, copioſe & eleganter Olden. Topic. legal. loco a definitione. (p) Gloſſ. & DD. maxime Cagnol. in d. L. omnis diffinitio. Euerard. loco a definitione.

(q) Quã Alciatus ſubſtantialem appellat. li. 9. parergon. c. 2. perfectam Bartolus in L j. de de teſta ff. immo perfectiſsimam, nec in cõtrouerſiam reuocandã dicit Graſſ. d. §. teſtã. q. 1.

(r) Sũma Hoſtiẽſ. tit. de teſta. §. quid ſit. Sichar. in Rub. de teſta. C. n. 2.

(s) L. Nemo de leg j. L filius de cond inſt. ff. Bar. in d. L. j. de teſta. n 3. de Rebuff. in L. iuſta. ff de verb. ſig. fol. 888.

(t) L. conditiones L. filius de cond. inſtit. ff. Summa Hoſtienſ. d. tit. de teſta §. quid ſit & Rebuf. in d. L. iuſta.

(v) Exod. c. 20.

(x) Quidam ff. de cõd. inſtit. Sichard. in Rub. de teſta. n. 2. C.

(y) Expedit enim Reipub. ne quis re ſua malè vtatur, §. ſed & maior. inſtit. De his qui ſui, vel al iur.

(z) d. L. quidam & L. conditiones, el 1. & 2. ff de cond inſt. Sichard. in d. Rub. de teſta. C. Caſtrenſ. in L. Non oporter. C. de his quibus vt indig.

abſolute definition (*q*) of a teſtament aboue deliuered, not being rightly vnderſtoode, might ſeeme either more dangerous, or leſſe commodious then it deſerueth; I thought it expedient to adde this expoſition following.

Firſt, whereas a teſtament is defined to be a *Iuſt Sentence*, we are to conſider that this † word *Iuſt*, hath diuers ſignifications in the law. Sometimes †it is oppoſed to that which is wicked or repugnant to iuſtice, equitie, and to good and wholeſome manners. (*r*) Being taken † in this ſence, it geueth vs to vnderſtand, that the teſtator cannot commaunde any thing that is wicked, or againſt iuſtice, pietie, equitie, honeſtie, &c. (*s*) For thinges vnlawfull are alſo reputed impoſſible: and therefore if the teſtator ſhould commaund any ſuch thing in his teſtamẽt, the ſame were not to be obſerued. (*t*) As if he ſhold wil any man to be murthered; for this is againſt the law of God: (*u*) or if he ſhould commaunde his body to be caſt into the riuer, for this is againſt humanitie; (*x*) or if he ſhould command his goods to be burned, for this is againſt policie; (*y*) or if he ſhould commaunde any ridiculous acte, or preiudiciall onely to his owne credite and dignitie; as if he ſhould will his buriall or funerals to be ſolemniſed with May-games, or Morrice daunces, for this were to manifeſt his follie, or at leaſt to make queſtion whether he were of ſound minde and memorie. (*z*) In theſe and the like caſes the Executor in not performing the commaundements or requeſts of the teſtator is not onely holden excuſed, but is

6 7 8

high-

highly commended.(*a*)

9 Furthermore † this worde *Iuſt*, is ſometimes taken for *full* or *perfect*: (*b*) So wee ſay, when a woman hath gone her full time with childe, (which is cõmonly nine moneths,) (*c*) that ſhe hath gone her iuſt time. So wee vſe to ſay iuſt age for full and perfect age, (*d*) and ſo, iuſte waight, iuſt meaſure, iuſt number; for full and
10 perfect waight, meaſure, number. (*e*) The † word *Iuſte*, being thus vnderſtoode, that is to ſay, for full and perfect, all teſtamentarie defectes and imperfections, are thereby excluded. Wherfore the teſtament ought to be full compleate and perfect; otherwiſe being an vnperfect teſtamẽt, it is ſaid to be no teſtaments. (*f*)

11 The † teſtament is ſaid to be imperfect in two reſpects, vz. in reſpect of *Solemnitie*, and in
12 reſpect of *Will* or meaning. (*g*) The † teſtament is imperfect in reſpect of ſolemnitie, wherein ſome of the Legall requiſites, neceſſarie in the making of a teſtament, be wanting. (*h*) Hereupon diuers writers, haue interpreted the worde *Iuſt* in this definition to ſignifie *Solemne*, (*i*) that is to ſay, furniſhed with ſuch due rites and for-
13 malities, as the law requireth. Howbeit † all the ſuperfluous ſolemnities of the Ciuill lawe, are vaniſhed out of this kingdome of Englande. Onely thoſe ſolemnities remaine which be *Iuris Gentium*. (*k*) So that with vs it is ſufficient, to the effect of executing the teſtament, that the will and minde of the Teſtator doe appeare, by two ſufficient witneſſes[1]: Sauing where landes, tenements, and hereditaments are deuiſed: for

a) d. l. quidã & ibi Ang. Paul. de caſtr. & alij, & videas etiam Mantic. de Coniect. vlt. vol. li. 2. tit. 5. n. 9.

(b) Bar. in d. L. j ff. de teſta Sichard. in Rub. de teſta. C. Couar. in Rub. de teſta ext prim. part.

(c) Tiraquel. in Rep. L. ſi vnquam. C. de reuoc. dona. verb. ſuſceperit. vbi non minus elegan-ter quam diligenter docet, quamdiu mulier vterum ferre valeat.

(d) L. Filius-familias. de leg. 3. ff. Rebuff. in L iuſta. de verb ſig.

(e) Couar. in Rub. de teſt. ext. pri. part. n. 4 e-iuſd. farinæ eſtquod ibi dicitur, Iuſtus exercitus, iuſta claſsis, iuſta pugna, iuſtæ ſtationes, iuſtũ volumen, iuſtus error, &c. Adde quod ſcribit Minſing. in Rub L. de teſta. lib 2. inſtitu. iur. Ciuil.

(f) §. Ex eo inſtit. Quibus mod. teſt. infir.

(g) Bar. & alij in L. hac conſultiſsima. §. ex imperfecto. C. de teſta. Boer. deciſ. 240.

(h) Sichard. in d. §. ex imperfecto.

(i) Viglius in tit. de teſta ord. inſt. n. 29. Minſ. eod. n. 5. Sichard. in Rub. de teſta. C. n. 2.

(k) Infr. ead parte. §. 9

(l) Lindw. in ſtatutum verb. proba. de teſta. lib 3. prouincial. conſtit. cant.

then the ſolemnitie of writing is alſo neceſſarie, and that to be done, in the life time of the teſtator. (*m*) The † teſtament is ſaide to be imperfect in reſpect of will, which the teſtator hath 14
begun, but cannot finiſh as he would. *n* If therfore † whiles the teſtator is in making his will, 15
and whiles hee yet intendeth to proceede further at that preſent, either by adding or diminiſhing any thing to or from his teſtament, or by altering any thing therein, (as commonly men do vſe to put in, put out, and change many things before they make an ende,) (*o*) he be ſodainly ſtricken with ſicknes, inſanity of mind, or other impediment, whereby he cannot then finiſh, or perfect the ſame, as he would, and ſo die: This his teſtament, being imperfect in reſpect of will, is therefore voyde, euen touching that which was done, which he did intend then to alter, before he had made an end (*p*); by reaſon of the defect of the teſtators conſent, without which the teſtament is not of any value. (*q*) Neuertheles, not euery teſtamẽt which is tearmed imperfect in reſpect of will, is by and by wholy of no force, for in many caſes, yea and for the moſt part, ſuch teſtaments are effectual, for ſo much as is already doone, as elſwhere more aboundantly is confirmed. (*r*)

There is yet † alſo a further myſterie, or ſe- 16
crete meaning included in this word *Iuſte*, in that it doeth ſignifie full or perfect, which meaning is this: That the teſtament ought to be compleate, not onely in reſpect of ſolemnitie, and of will, as is aforeſayd: but alſo that it ought

(m) Stat H.8. an. 32. c. prim.

(n) Bar. Sichard. & alij in L. Hac conſultiſsima §. ex imperfecto. C de teſta. L. ſi quis ita. ff. eod. tit. L. furioſ. C. qui teſta. fac. poſ.

(o) Iul. Clar. §. teſtam. q. 7. in fin.

(p) d L. ſi is qui, & L. furioſũ Iaſ. & Sichard. in L. pen. de Inſt. & ſub. C.

(q) Sichard in d. L. hac conſultiſsima. § ex imperfecto de teſta. C. n. 2.

(r) Infr. parte prim. § 14.

to be perfect in this reſpect eſpecially, that ther-
is no want of any thing, which is neceſſary to
the conſtitution, and denomination of a teſta-
17 ment(s). For if † it doe conteine onely a perfect
declaration of the teſtators will, and want that
which is requiſite to make it a teſtament, it may
well be tearmed a perfect will, (for a Codicill,
a Legacie, a gifte in reſpect of death, &c. they
are all perfect in their kinde:) (t) But it cannot
be tearmed a teſtament, much leſſe a perfect te-
18 ſtament. This † ſingular ſence and ſignification
of the word *iuſt* becauſe ſome interpreters did
not perfectlie apprehend, they did reprehend
the definition, as not perfecte nor conuertible
with a teſtament: that is to ſay, not agreeable to
a teſtament alone, but common to euery kinde
of laſt will: (x) for that they alſo were perfect
euery of them in their ſeuerall kind. (y) Wherin
neuertheleſſe they were deceiued, for the per-
fection that is here meant, is an abſolut perfec-
tion, ſuch as none other laſt will hath but one-
ly a teſtament, euen that perfection that giueth
both name, and nature to a teſtament. (z) So
that the defect was not in the definition, but in
their vnderſtanding. To conculde therfore, this
perfection ſpecially being here vnderſtood by
this word *iuſt*, which is proper and peculier to
a teſtament, the definition remaineth irrepre-
henſible, and is agreeable to a teſtament only;
excluding both Codicil, Legacie, gift in regard
of death, & euery other kind of laſt will, (a) ha-
uing euery thing, and wanting nothing, which
appertaineth to the eſſence of a teſtament. (b)

(s) Bar. in L. j. de teſta. ff. Viglius & Minſing. in tit. de teſta. ordin. in princ. Alciatus in L. Tabernæ de verb. ſig. ff. Couar. in Rub. de teſt. extr.

(t) Paul. de caſtr. in d. L. j. de teſta. ff. Nec ideo Muſca dicitur imperfectum animal quod ſit minor Elephante, inquit Couar. in Rub. de teſt. extr. j part. n. 3.

v) Bar. in d. L. j. de teſta. ff. Minſing. in d. tit. de teſta. ord.

(x) Accurſ. & Paul. de caſtr. in d. L. j. de teſt. ff.

(y) Paul. de caſtr. in d. L. pri.

(z) Bar. (omnium Legiſtarum facillime princeps) Bald. Ange. Imol. Aretin. in d. L. j. de teſt. ff. Porcus Viglius, Minſing Inſt. de teſta. ordi. Vaſq. de ſucceſ. crea. lib. j in prin. n. 26.

(a) Bar. in d. L. prim. de teſta ff. Viglius & Min. ſing in d. tit. de teſta. ordin. Inſtit. Couar. in Rub. de teſta. extr. part. prim.

(b) Mantic. de coniect. vlt vol. lib j. tit. 4. n. 10. Graſſ. Theſaur. com. op. §. teſta. q. j. Couar. in Rub de teſta extr. n. 14. 3. & 4. ſup. §. in fin.

Now † if you will aske me what kind of perfection, or what speciall thing this is, without the which the will howe perfect soeuer otherwise, is no testament. I haue tould it before. (*c*) It is the naming or appointing of an Executor (*d*). (Who in the ciuill Lawe is called *Hæres* heire) (*e*). This is said to be the foundation, the substance, the head (*f*) and is in deede the true formall cause of the testament, (*g*) without which a will is no proper testament, (*h*) and by the which onely the will is made a testament (*i*). 1

Sentence, this word † *sentence* is a general word, and hath many significations, it is sometimes taken for a short pithy saying of a graue or wise man. (*k*) It is sometimes taken for a decree pronounced by the Iudge, (*l*) and in other places it is other wise taken. (*m*) It is taken in thys place, for an aduised purpose, or destination of the testators mind, (*n*) which purpose or destination of mind being reduced into act, (otherwise reteined within the compasse of sole cogitation, it is no testament) (*o*) is termed a *sentence* by a certaine excellencie: [p] becausse in † our te- 2 3

c) Supr. §. j. in fin.
d) L. pri. de hæred. inst. L. pri. de vulg. & pup. sub. L. Hæredes pa'ã de test. L. quod per manus de Codicil. ff. § ante institut. de Lega. Bractõ. de leg. & consuet. Ang. lib. 2. c. 26. Brooke Abridg. tit. test. n. 20. Plowden in casu inter Greisbrook & Fox, & plenius inf. part. 4. § 2.
e) d. § ante insti. de leg. Haddon de refor. leg eccleſiast. Angl. Doct. & Stud. lib. 2. c. 11 trac. de repub. Angli. 3 c. 9. ita vt Executor testamẽtarius iure quo nos vtimur non tàm re q̃ nomine differt ab eo quem ius ciuile nũcupat hæredẽ infr. 6. par.
(f) d. § ante instit. de de lega.
g) Wesen. in paratit. de test. ff.
h) L. quod per manus ff. de Codicil. Brooke. Abridg. tit. testa. n. 20. Plowden in casu inter Greisbrook & Fox, fol. 276 Haddon. vbi supr.

(i) Vide infr. part. 4. §§ 1. 2. (k) Cuius generis sunt sententiæ Ciceronis, Prouerbia Salomonis, & aliorum hominum cùm Philosophorum, tùm Theologorum, dicta memorabilia.
(l) Paul. de castr. Lancel. Doc. in L. j. de testa. ff. (m) Veluti pro opinione, pro persuasione, Coratius de com. opin. in princ. Dictionar Calepin. verb. Sententia. Quandoque sumitur pro pœna a iure inflicta. Franc. in c. fin. de constit. 6. in fin. (n) Iusta sententia quid significet, breuissimè & elegantissimè (vt semper solet) æquissimus ille iuris interpres Iohannes Oldendorpius, Hoc est (inquit) vera, ac omnibus modis absoluta animi destinatio, quam si ad alias in vita deliberationes conferas, longè excellit omnes. De action. class. 5. in princ. (o) Quod fortasse fuit in causa, quòd Anglus quidam vertendo dictam definitionem à latino idiomate in vulgare nostrum sic transtulit, Iustam sententiam

 (p) Couar. in Rub. de test. ext. j. par. n. 4

staments,

ſtamentes, wee ſhould ſhewe our ſelues both wiſe and iuſt; repreſenting as it were the perſons of graue men, and of iuſt Iudges. And † certainelie if al the actions of this life ought to be performed with wiſedome, and conſtancie; if nothing ought to be attempted without carefull conſideracion, and due premeditation (*q*). How much more ought the laſt acte of our life, our farewel to the world, the memoriall of our immortality, (*r*) euen our teſtamentes and laſt wils, to be framed with deliberation, ſeaſoned with diſcretion, & builded vpon ſound and conſtant determination: (*s*) without the which it hath neither ſhape, nor ſauour, of a teſtament; nor is able to ſtande for a teſtament, when it ſhalbe tried or prooued in the forme of Law (*t*).

q) Cic. lib. 1. offic.

r) Olden. de action. claſſ. 5. in prin.

s) Adde quod quæ vitii facimus dicimuſue, ea aliquando non magni ſunt momẽti, & ſi quid diſpliceat obuia nobis ſunt emendandi remedia & formulæ; verùm quod in cauſam mortis deſtinamus, id ita proponimus, vt poſt hanc vitam nunquam mutari velimus. Old. vbi ſupr.

Seeing then euery teſtament is a *ſentence*, we
6 may note diuers thinges. Firſt that † ſuch perſonnes as haue not the vſe of reaſon or vnderſtanding, as madde folkes, or idiots, are iuſtlye excluded from making of teſtamentes, (*v*) for their deuiſes being full of folly, theyr deedes muſt needes be voyd of diſcretion, and their wittes being ſenceleſſe, their wordes are vtterly vnworthy the name of a ſentence; howſoeuer ſometimes, more by chaunce then by cunning, they may ſeeme to ſpeake wiſely. (*x*)

t) Conſule Socin. Iun. conſ. 179. vol. 2. Hotto. conſ. 5. vol. j. Hyero. Franc. in L. quicquid de reg. iur. ff.

v) Vide inf. part. 2. § §. 2 3. 4 5. & 6.

x) Iaſ. & Dec. in L. furioſi C. de teſta cõtra Io. Andr. Panor. & alios in c. ad noſtram de conſuetud. ext. cum tẽperament. tamen vt infr. 2. part, § 4.

7 Secondly, † that albeit the teſtator be of perfect mind & memory, neuertheleſie if he ſpeake any thing, eyther vnaduiſedly, or incidently, as if a man when he is in perfect health, being demaunded who ſhall be his executor, or haue

his goods after his death; (which queſtion is very common amongſt familiars) and he forth with nameth ſome perſon, whom he ſaith hee » wil make his executor, or to whom he will leaue » his goods after his death. This is not to be ta- » ken for a teſtament or laſt will, neither is that perſon named to be admitted Executor, nor to haue his goods[y]: vnleſſe it be † proued, that the 24 teſtator at the time when the words were ſpoken, had *Animum Teſtandi*, that is to ſay, a mind or purpoſe then and thereby to make his teſtament or laſt will. Which minde and purpoſe muſt bee prooued by circumſtaunces (*z*), (for words alone are not ſufficiēt (*a*): as that he fra- 25 med or ſettled himſelfe ſeriouſly to the making of his laſt will, beeing then perhaps verie ſicke, or requiring them which were preſent to beare witneſſe of his will (*b*) *&c.* Otherwiſe euen as the opinion of a Iudge, being deliuered priuatly, or extraiudicially, touching the euent of any ſute, is but a prædiction of that which is likelie to enſue, and not the ſentence it ſelfe, or finall iudgement whereby the controuerſie is decided (*c*), (which ſentence ought to be pronounced iudicially, after dewe examination of the cauſe[d]:) So when the teſtator doth only foretell, whom afterwardes or at ſome other time, he dooth intend to make his executor, or to leaue his goods vnto; This is but a ſignification of a future acte, (*e*) and ſo not the teſtament it ſelfe, wherein is required preſent and perfect conſent (*f*). Much leſſe is that to be taken for a teſtament, when as any man raſhely, boſtingly,

or

y) L. Lucius L. Diuus de mil. teſta. ff. § plane inſtit. de mil. teſta. Soc. iun. conſil, 179. vol. 2. quod videas velim & perlegas diligenter.

z) Menoc. de Arb. iud. caſu 496. vbi copioſe reſpondit, quæ & quot coniecturæ ſufficiant.

a) Gloſſ. in § plane Inſtit. de teſta mil. Hottom. conſ. 5. vol. j.

b) Gloſſ & DD. in d. L. Diuus Menoch. in d. caſ. 496. & plenius infr. part. 7. § 13.

c) L. ex ſtipulatione C. de ſenten. & interlocu. Sprigel. Lexic. verb. ſententi.

d) Bar. & alij in d. L. ex ſtipulatione. Vantius Nullita. vz. ex defect. proceſſ. n. 69.

e) Pariſ. conſil. 24. lib. 3 n. 10.

f) Hottoman. de conſil. 5. Corne. conſ. 149. vol. 2.

or ieſtingly, affirmeth that he will make this or that mã his executor, whẽ he hath no meaning at all, neither at that time, nor any other tyme to make him executor (*g*). For without meaning, or conſent of minde, the teſtament is altogether without life; and is no more a teſtament, then a painted Lion, is a Lion.

g) Alciat. par. 2. lib. 2. c. 12. Pariſ. conſil. 127. vol. 1. n. 40. 41. Hyero. Franc. in L. quicquid de reg. iur. ff. n. 3.

Thirdly by this that a teſtament is tearmed a *ſentence*, there is a further conſideracion offered to our vnderſtanding, in reſpect of the analogy, betwixt a iudicial ſentence & a teſtament.

26 Of Iudiciall † ſentences there bee two ſortes, the one *interlocutory*, the other *definitiue* (*h*). An *interlocutory* ſentence, is a decree giuen by the iudge, betwixte the beginning and ending of the cauſe, touching ſome incident or emergent queſtion (*i*). A *definitiue ſentence* is a finall decree, whereby the principall cauſe and controuerſie is decided, in condemning or abſoluing the party conuented [k]: Theſe † two ſentences, haue theſe two cõtrary effects. The one of thẽ, that is to ſay, *the ſentence interlocutorie*, may be reuoked at any time ſo longe as the principall cauſe dependeth vndecided (*l*). But the *ſentence definitiue* cannot be reuoked (*m*). The † teſtament of any man, ſo long as he liueth, may bee compared to a *ſentence interlocutory*. For it maie be reuoked or altered at any time, and as oft as the teſtator will, whiles he liueth, euen vntil the laſt breath: (*n*) and of theſe the laſt will preuaileth (*o*). But after his death, it is compared to a *ſentence definitiue* [p], and as it cannot be reuoked by the dead man, ſo ought it not to be reuoked by

h) Tit. de ſent. & interl. om. Iud. C.

i) Specul. de ſentent. § ſpecies.

k) Specul. vbi ſupra.

l) L. quod inſtit. ff. de re. iud. c. cum ceſſante. de app. extr. L. ſi quis iuſiurand. § fin. C. de reb. cred.

m) L. Iudex de re. iud. I. j. de quæſtion. ff. L. j. de reſcind. ſen. C. Rebuff. in d. L. quod inſtit, vbi multifariam limitat vtramque concluſionẽ.

n) L. 4. de Adimen. leg. ff. c. Marthæ. de Cæleb. miſſ. ext.

o) § poſteriore. Inſtit. Quib. mod. teſt. infir.

p) d. c. Marthæ.

by any other, but obſerued as a law (*q*), and executed as the *ſentence* of a Iudge (*r*). And they are to be puniſhed that doe hinder the execution of the ſame [s].

It followeth in the definition *(of our will)* concerning this worde *will*. It † is written, that the will or meaning of the teſtator is the Queene or Empreſſe of the teſtament. (*t*) Becauſe the *will* dooth rule and gouerne the teſtament, enlarge and reſtraine the teſtament, and in euerie reſpect moderate and direct the ſame, (*v*) and is in deede the very efficient cauſe thereof. (*x*) The † will therefore and meaning of the teſtator, ought before all thinges to bee ſought for diligently; and being found ought in any wiſe to be obſerued faithfully, (*y*) it ought to bee ſought for as earneſtly as the hunter ſeeketh his game: (*z*) And † as to the ſacred anker ought the iudge to cleaue vnto it: Pondering not the words, but the meaning of the teſtator (*a*). For although no man be preſumed to thinke otherwiſe then hee ſpeaketh, (*b*) (for the tongue is the vtterer or interpreter of the heart, (*c*) yet cannot euery man vtter al that he thinketh, and therefore are his wordes ſubiecte to his meaning. And as the mind is before the voyce, (for we conceiue before we ſpeake) ſo is it of greater power; for the voyce is to the minde, as the ſeruant is to his Lord. [d]

Where it is ſaid in the definition *of our will*, the interpreters doe gather by this woorde *our*, that the teſtator ought to enioy all liberty, and freedome in the making of his will: that is to ſay

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q) L. j. C. de ſacroſanct. eccle.
r) Olden. de action. claſſ. 5. in prin.
s) c. Statut. de teſta. lib. 3. prouinc. conſtit. cāt. c. ſtatuimus eod. tit. lib prouincial. conſtitut. Ebor.
t) Richard. in Rub. de teſta. C. n. 2. in fin.
v) L. in conditionibus de cond. & demon. L. ſi mihi § in legat. de leg. j. ff.
x) Weſenb. in tit. de teſta. ff.
y) Vide infr. par. 4. § 4.
z) Bald in L. pen. de neceſſ. hæred. inſtitu. C. Socin. Iun. conſ. 144 vol. 2. n. 23.
a) § noſtra inſtit. de lega.
b) L. Labeo. § cæterum de ſup. leg. ff.
c) Weſenb. in tit. de verb. ſig. ff.
d) d L. Labeo.

ſay full power and habilitie, to withſtande all contradicton and countermaund [c]. And therefore † if the teſtator be compelled by violence, 32 or vrged by threatnings, to make his teſtament: the teſtament being made by iuſt feare, is vneffectuall [f]. Likewiſe if hee bee circumuented by fraud, the teſtament loſeth his force [g]: for albeit honeſt and modeſt interceſſion, or requeſt, is not prohibited; yet theſe fraudulent and malicious meanes, whereby many are ſecretly induced to make their teſtamentes, are no leſſe deteſtable then open force [h].

e) Mantic. de coniect. vlt. vol. lib. j. tit. 3. n. 10

f) L. j. Quod me. cauſa L. fin. Si quis aliquem teſtari prohib. ff. in fr. part. 7. § 2.

g) d. L. fin. Si quis aliq. teſtari prohib. ff. & inf. par. 7. § 3

33 Moreouer by † occaſion of the aforeſayde wordes *our will*, the writers doe collect that the teſtator muſt be *ſui iuris*, that is to ſay, a freeman, not in ſubiection, as bondmen and other lyke perſonnes [i], of whom mencion is made hereafter [k]: Which haue not liberty to make a teſtament.

h) Old. n. de action. claſſ. 5. in princ. & infr. part. j. § 3,

i) L qui in poteſtate ff. de teſta. & L ſi quæramus eod.

k) Inf. part 2. § 7, 8, &c.

34 Likewiſe † by thoſe wordes *our will*, are excluded thoſe willes which depend of an other mans will [l]. Wherfore if the teſtator ſhould referre his will to the will of another as if hee
» ſhould ſay. I giue thee leaue and auctority, to
» make my will; and to make executor for mee
» who thou wilt, &c. If here vpon thou didſt make a will, in his name, and didſt name an Executor for him, yet this will is voyd in lawe [m]. For as thy ſoule is not my ſoule, ſo thy will is not my will, nor thy teſtament my teſtament [n].

l) L. captatorias. C. de teſt. mil.

m) Bar. in L quidam. ff. de reb. dub. n. 7. Bald. in L. Executorem. C. de excep. rei iud. n. 5. Io. And. Gem. & Franc. in c. ſi patr. de teſta. 6. Pariſ. conſil. 38. vol. 3. n. 60. & inf. par. 4. § 11.

n) Bald (qui nihil ignorauit) & Angel. in L. captator. C. de mil. teſt. Pariſ. d. conſ. 38. n. 40.

Furthermore by force of theſe wordes *of our* 35 *will*, the † teſtament being tearmed *a ſentence* differeth frō thoſe other ſentences which are not

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of will: that is to say, frō that sentence, which is the saying of some graue man: for that is not a sentence of will but of reason [o]; and frō the sentence of a iudge, for that is not a sentence of wil but of iustice [p]. And howsoeuer the testator may declare his sentēce, that is to say, his testamēt, as he will [q]: yet the Iudge may not pronounce his sentence as he will [r]: But he must iudge according to that which is alleadged and proued [s], (although paraduenture as a priuate man, hee knowe the same to be vntrue) sauing in certain cases [t], which because they are impertinent to this discourse, are not here to be handled.

It followeth in the definition *touchinge that which we would haue don after our death.* By which wordes, a testament differeth from all other sentences, proceeding from our will, and from whatsoeuer actions which take theyr effecte in the life time of the testator [v]. For † a testament 36
respecteth that, which is to be performed after the death of the testator, and therefore so long as he liueth, the testament is of no force; but dooth take his strength, and is confirmed by the testators death [x]. By these wordes also wee may collect, the material and the finall cause of euery testament: Which thing becaus I haue more amplie enlarged hereafter, let this suffise which hath bene spoken; for a taste only of such fruite, as growe in this garden.

o) Paul. de castr. in d. L. j. de testa. ff.

p) Paul. de castr. & Lācel. dec. in d. L. j. de testa.

q) In testamentis stat pro ratione voluntas. Mantic. de coniect. vlt. vol. lib. 6. tit. 14. n. 2.

r) Instit. tit. de offic. Iud. in princ.

s) Illicitus. § veritas ff de offic. præsidis.

t) Tu, si placeat, videas Io. Olden. æquisiuris interp. Coras. lib. 3. Miscel. c. 20. Couar. lib. 1. var. resoluc. c. 1. Gentil. Disputac. vj. & generaliter Legistas in d. L. Illicitus & Cannostas. in c. j. de offic. ord. extr.

v) Paul. de castr. in d. L. j. de testa. ff. Minsing. in tit. de testa. ordin. Instit. Couar. in Rub. de testa. extr. part. j.

x) L. 4. de Adim. leg. ff. & Marthæ. de celeb. missi. extr.

The Definition of a last will.

1 *What is a last will.*
2 *Wherein the definition of a last will doth agree, or differ*

differ with or from the definition of a teſtament.

3 *Of the difference betwixt theſe two wordes* Lawful *and* Iuſt.

4 *Of the difference betwixt theſe two wordes* Diſpoſition *and* ſentence.

§.iiij.

1 A Laſt will is thus defined. † *Vltima voluntas eſt legittima diſpoſitio, de eo quod quis poſt mortẽ fieri velit.*[a] A laſt wil, is a lawfull diſpoſing of that which anie

a) Franciſ. Mantica de coniect. vlt. vol. lib. j. tit. 4. num. 10.

2 would haue done after death. This † definition differeth not frõ the definition of a teſtament, ſauing in two wordes: that is to ſaye, in ſteede of *iuſta ſententia*, a iuſt ſentence, which is in the definition of a teſtament; here is *ligitima diſpoſitio*, a lawfull diſpoſing[b]. Now if wee ſhall conſider the difference betwxit theſe wordes, *iuſta ſententia*, and *legitima diſpoſitio*; then ſhall we vnderſtand the full difference, betwixt a laſt wyll and a teſtament, (eyther being vnderſtood according to his difinition) for in the reſt both the deſinitions doe agree, and that which hath beene or may be ſayd of the one, may alſo bee verifyed of the other.

b) Supr. § 2. & § 3.

3 *Lawfull* † and *iuſt*, doe thus differ. This word *lawfull* hath not all the ſignifications which bee included in the woorde *iuſt*. For albeit by this word *lawfull*, is excluded whatſoeuer is wicked, or whatſoeuer is contrary to iuſtice, pietie, or equity: or contrarye to good and wholeſome manners, as well as by the word *iuſt*[c]. And although

c) Spiegel Lexic. verb. legitimum.

though the woord lawfull may also signifye solemne, or furnished with such due rites as lawe requireth,[d] as well as in the woord iust dooth, albeit also that the word lawfull in soome sence doe signifie perfect[e], that is to saye, not wanting any thing which the testator ment to vtter[f]: yet it doeth not signifye perfect in such an excellent or speciall sence as doth the word iust[g]; that is to say, hauing such perfection, as is requisite for the forme of a testament, and is proper thereunto; namely the appointing of an Executor, by the which forme a testament differeth from all other last willes of what kind soeuer they be[h].

d) Gloss. in c. consanguinei de sen. & re. iud. extr.
e) L. Certo §. vlt. de serui. rust. præd. verb. legitima latitudo.
f) Supra §. 3. n. 9.
g) Mantic. de coniect. vlt. vol. lib. j. tit. 4 n 10.
h) Supra § 3. n. 19.

This word † *dispositio* is sometimes taken for a qualitie of the minde, or vnperfect habit, that is to say, an inclination or affection[i]. In this place it doeth signifye an acte proceeding from a firme purpose or resolution[k], like as the word sentence in the former difinition[l]. And albeit this word sentence seeme to insinuate a greater heede, or a more discreete consideration, to be taken in the disposing of that wee would haue doone after our death, then the nature of this word disposition doth inforce: Yet no last will is of any force, *sine animo disponendi*, no more then is the testament *sine animo testandi*[m]. 4

i) Io. Casus Oxon. tract. dialect. ij. part. c. 20. 21.
k) Mantic. de coniect. vlt. vol. lib. j. tit. 4.
l) Supra § 3. n. 20.
m) Vide infr. par. j. § 13.

The definition of a Codicill.

1 *This word Codicill signifieth a little booke.*
2 *A Codicill rightly defined.*
3 *How the definition of a Codicill dooth agree, with the*

the definition of a teſtament or differ from it?

4 *The ſignification of the word* iuſt *in this definition of a Codicill.*

5 *A teſtament is called a great will, and a Codicill a little will.*

6 *A teſtament and a Codicill, compared to a ſhip and a boate.*

7 *Of the inuention of Codicilles.*

8 *Codicilles may be made in writing, or without writing.*

9 *Codicilles may be made, either by him which hath made a teſtament, or which dieth inteſtate.*

10 *Who muſt pay the legacies giuen in a Codicill, by him which dieth inteſtate.*

11 *Codicills be reputed parte of the teſtament, whether they be made after, or before the teſtament.*

12 *Codicilles and teſtamentes doe agree in the efficient cauſe: But they haue contrary effects.*

§.v.

1 *Codicillus*, a Codicil, is a diminutiue of *Codex* [a], a booke. And ſo this † word *Codicill* becing rather Latine then Engliſh, doeth ſignifye a little booke, or writing, [b] the reaſon wherefore it is ſo called doeth ſtraight wayes appeare.

2 A Codicill is diuerſly defined of diuerſe. In my opinion it is † rightly defined after this

a) Codicillus à codice, Codex rurſus dicitur à caudice, ſiquidem codex ſignificat contextum tabularum quæ priſcis temporibus aptabantur cera ad ſcribendum, tametſi loco tabularum pergameni & chartæ commodior ſucceſſerit vſus Olden. de action. claſſ. quint. in princ. Spiegel. Lexi. verb. codicil. (b) Gloſſ. in Rub. inſt. de codicil. (c) Sic enim a pleriſque definitur, vt ſit vltima voluntas minus ſolennis abſque hæredis inſtitutione. Quæ definitio vix arridet, vt qua vix intelligam, quî differat codicillus à legato, quum & iſtud videatur voluntas vltima abſque hæredis inſtitutione, nec magis ſolennis, nec minùs perfecta, quàm eſt codicillus. Paul. de caſtr. in L. j. de teſta. ff. Couar. in Rub. de teſta. ext. par. j. n. 3.

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manner. *Codicillus est voluntatis nostræ iusta sententia de eo quod quis post mortem suam fieri velit absque Executoris constitutione.*[d] A Codicill is a iust sentence of our will, touching that which anie would haue done, after their death, without the appointing of an Executor. Which definition † doeth agree almost word for woorde 3 with the definition of a testament: sauing that some wordes are heere expressed, which are there omitted[e], *absque Executoris constitutione*, without the appointment of an executor. By force of which wordes the Codicill is made to differ from a testament: for a testament can no more consist or be without an Executor, then a Codicill can admitte an Executor[g]. By the † 4 same wordes also is restrained that speciall signifycation of the word *iust*, which in the definition of a testament, importeth that singular perfection and proper forme, whereby a testament differeth from all other kindes of willes[h]. For here this word *iust* is not onlie destitute of that peculier sence: but it doeth not so much as signify solemne, or furnished with testamentarie rites or formalities[i]. For a Codicill is an vnsolemne last will[k]. So that by the woord *iust* in this definition is excluded that which is vnlawfull, and that perfection onelye included, which may stand with the nature of a Codicil[l]. Whereupon † the writers conferring a testament and a Codicill together, and perceiuing the oddes betwixt the one and the other, they call a testament a great will, and a codicill a little will[m]. And doe † compare the testament to 6

d) Mantic. de coniect. vlt. vol. lib. 1. tit. 8.

e) Supr. § ij.

g) Intellige, directò, nã obliquè seu per fidei-commissum hæreditas codicillis iurè relinquitur. § Codicillus instit. de Codicil. Adde Vasq. de succes. creat. lib. 3. § 25. Vbi regula extat. Ampliationibus octo, & sex Limitac. ornata.

h) De qua supr. § 3. n. 19.

i) Minsing. Instit. de Codicil.

k) Graff. Thesaur. com. op. § Codicil. in prin.

l) De cuius vocabuli significatione, supr. § 4. n 3.

m) Accurs. & alij in Rub. de codicil. Instit. Sichard. in Rub. de Codicil. C.

a ſhip, and the Codicill to a boate [n], tyed moſt commonly to the ſhip. And not vnfitly, aſwell becauſe the Codicill is not able to ſuſtaine, the heauie burthen of an Executor, who repreſenting the perſon of the teſtator [o], doth as it were (like *Atlas* who is fained to carrie the world vpon his ſhoulders) beare vpon his backe, the whole maſſe and weight of all the goods, and cattels which did belong to the deceaſed [p], and on whoſe necke are laide all the actions, which either might bee intended againſt the teſtator by others, or againſt others by the teſtator [q]: As alſo becauſe the Codicill beeing (as I haue ſayd) an *vnſolemne laſt will*, can no more containe al thoſe ſolemnities, ceremonies, and formalities which the Ciuill lawe doeth exacte in a teſtament [r], then a little boate is able to ſupporte, the tall maſtes, broade ſayles, the great ſtore of the huge and weighty tackle and furniture belonging to a great ſhip, with the burthen whereof the boate muſt needes ſincke and periſh [t]. And in deede when † Codicilles were
7 firſt inuented, they were vſed very ſparinglie [v], that is to ſay, in ſteede of a teſtament, when the teſtator had not oportunitie to make a teſtament, by reaſon of the manifolde ſolemnities thereof [x]; which were remitted in a Codicill [y]: or elſe as additions to the teſtament made, when as any thing was omitted in ſuch a teſtament, which the teſtator would adde, or ſome thing put in, which the teſtator vpon better aduiſe, would detract. Which emendation of the teſtament, was alwaies done by way of Codi-

n) DD. maxime. Sich. in Rub. de Codicil. C. in princ.

o) Sichard in Rub. de iure delib. C. n j. Minſi. in Rub. de hæred. inſtituend. Inſtitut. Doct. & Stud. lib. 2. c. 11.

p) L. Hæreditas de reg. iur. ff. & ibi Cagnol. Plowden in caſu inter Greisbrooke & Fox, & latiùs infr. part. 6. §. 3.

q) Inſtit. de perpetuis & temp. action. Tearms of law. verb. execut. & infr. part. 6. §. 3.

r) Olden. de action. claſſ. 5. in princ.

t) Aduerte tamẽ, quòd iſta ſimilitudo procedit intuitu iuris tantum ciuilis, quia iure quo in hoc regno vtimur, non magis onerantur teſtantes quàm codicillantes ſolennitatum obſeruatione.

v) Nempe vt condimẽti non vt cibi fuit olim codicillorum vſus. Olden. vbi ſupr.

x) L. Codicillorũ §. codicilli ff. de codicil. Inſtit. eod tit. in prin.

y) §. vlt. inſtit. de Cod.

cill [z]. And this was that reason (wherof I spoke before) wherefore this kinde of last will, was tearmed a Codicill: that is to say, a little booke or a little writing.

Concerning † the diuers kindes of Codi- 8
cilles, although it be denied by some, that there be such two kindes of Codicilles, as there is of testamentes, viz. written and nuncupatiue [a]: yet it is graunted of the more part, that a Codicill may be made eyther in writing or without writing [b].

Moreouer it is graunted of all, that a † Codi- 9
cill may be made either by him which dieth intestate, or by him which dieth with a testament [c].

If the † Codicil be made by that person which 10
dyeth intestate: the Legacies therein giuen must be paied by him, that shal haue the administration of the goods of the deceased, as if he were executor [d]. In so much that if the Codicill were made long before the death of the partie now deceased, who after the making of the Codicill did beget a childe, to whom the Administration of the goods is committed, (whether he were borne during his fathers life, or after his fathers death,) he shal be charged with the paiment of the Legacies, as if he had beene borne when the Codicill was made [e].

If the † Codicill be made by him which hath 11
a testament; then whether the same were made before or after the testament [f], it is reputed for parte and parcell of the testament [g], and is to be performed aswell as the testament, vnlesse being

z) L. conficiuntur in prin. de iure codicil. Cuiacius in tit. de codicil. C.

a) Vasq. de succes. crea hb. 3. § 25. n. 27. Grass. Thesaur. com. op. §. codicil. n. 10.

b) Gloss in Rub. de codicil. C. Minsing in Rub. de codicil. Instit. Wesenb in tit. de iure codicil. ff. quamuis abusiuè dici codicillos oporteat conditos sine scriptis quum Codicillus sit paruula scriptura.

c) L. conficiuntur in prin. ff. de iure Codicil. §. non tantum. instit. de codicil.

d) L. ab intestat. ff. de Codicil. §. non tantũ. Instit. de codicil. Brook Abridg. tit. de vise. n. 35

e) d. L. ab intestat. L. si quis. §. sed etsi. L. grauis. L. is qui. ff. de iure codicil. Minsing. in d. §. non tantum. Iass. Sichard. & alij in L. j. C. de codicillis.

f) L. conficiuntur. ff. de Codicil. d. §. non tantũ Instit. de Cod.

g) Vigel. Method. iur. ciuil. part. 4. lib. 9. c. 23. in prin.

ing made before the teſtament, it appeare to be reuoked in the teſtament, or bee contrarye to that which is contained in the teſtament [h].

12 Codicilles † and teſtamentes doe both agree in the efficient cauſe, (as they doe in diuerſe others thinges [i]): Yet neuertheles they haue manie contrarie effectes [k]. They agree in the efficient cauſe, becauſe euery perſon which maie make a teſtament, may alſo make a Codicil; and whoſoeuer can not make a teſtament, the ſame perſon cannot make a Codicill [l].

They haue diuers contrary effectes. For firſt whereas no man can die with two teſtaments, (becauſe the latter doeth alwaies infringe the former [m]:) Yet a man may die with diuers Codicilles, and the latter doth not hinder the former, ſo long as they be not contrary [n]. Another contrarie effect is this. If two teſtamentes bee found, and it doe not appeare which was the former or latter, both teſtamentes are voyde [o]. But if two Codicilles bee found and it can not be knowue which was firſt or laſt, and one and the ſame thing is giuen to one perſon in one Codicill, and to another perſon in an other Codicill: the Codicilles are not voide, but the perſons therein named ought to deuide that thing betwixt them [p].

Finally it is to be noted, that there be diuers wordes which are common, or indifferent, eyther to make a Codicill or a teſtamēt. In which caſe whether the Iudge is to pronounce for a Codicill or a teſtament, is hereafter diſcuſſed [q].

h) Minſing poſt gloſſ. in d. §. non tantum. inſtit. de codicil.

i) Roland. Bonon. de arte notari. vbi refert 4. caſus, in quibus conuenit codicillus cum teſtamento. part. 2. c. 8. fol. 561.

k) In lib. quem appellāt Flores vltimarum voluntatum, octo numerātur differentiæ inter codicillos & teſtamenta, quarum tamen pars maxima iam eſt extincta.

l) Bar. & alij in L. 2 de leg. j. Graſſ. Theſaur. com. op. §, codicil. n. 2. qui affirmat hoc procedere non ſolum prohibente iure, ſed etiam prohibente ſtatuto teſtari.

m) §. poſteriore Inſtit. Quib. mod. teſta. infir.

n) L. cum proponat. C. de codicil.

o) L. vltim. & ibi. DD. de edict diui Adria. toll. C.

p) Gloſſ. & DD. in d. L. cum proponat. Graſſ. Theſaur. com. op. §. codicillus vbi atteſtatur hanc op. eſſe com.

q) Inf. parte 4. §. 5.

The definition of a Legacie.

1 *What is a Legacie.*
2 *Foure thinges to be considered in this definition.*
3 *Eucry legacie proceedeth of the liberality of the testator.*
4 *Howe a legacie differeth from a gifte in regarde of death, or from other gifies.*
5 *Not lawfull for the legatarie to take his legacie by his owne sole auctoritie.*
6 *Legacies paiable aswell by the administrator as by the executor.*
7 *Diuers kindes of legacies in times past.*
8 *The distinction of legacies confounded.*

§. vj.

A *Legacie* (otherwise tearmed of our common lawyers a *Deuise*[a]) is † a gifte lefte by the deceased, to bee paide or performed by the Executor, or administrator[b]. There bee other definitions of a Legacie which I doe willingly omitte, because this one is sufficient[c]. Wherein foure † thinges especially are to be noted. 1 2

First, in that it is called a gifte, it argueth that it † proceedeth of the meere liberality, & free good will of the dead man; and consequentlie that he is not of necessity tyed thereunto[d]. 3

Secondly in that it is *left*, it † differeth from other giftes; not onely those which are called deedes of gift, effected and executed in the life time 4

a) Tearms of law, verb. de vise.
b) §. j. Instit. de lega.
c) Constat plures esse Legati definitiones, aliam Florentini, aliam Modestini, aliam Iustiniani, quarum nulla est, quam vnus aut alter nō tentauit euertere, sed frustrà quidē sudarunt omnes; quippe quorū fractis argumētis nullā harum nō per se iustam, legitimēque traditam, clarissimè ostendit D. Gentilis Oxonien. hodie Legistarum decus. lib. 1. Lection. & epistol. c. 14. 15. 16.
d) Minsing. in d. tit. de legat. instit. §. j.

time of the Donor: but alſo from thoſe *giftes which be made in conſideration of death*, wherein the things giuē,are deliuered by the teſtator in his life time,to become their own to whō they are deliuered in caſe the teſtator die[e]. For legacies are not deliuered by the teſtator, but are to be payed by his Executor,or adminiſtrator[f].

e)§.j. Inſtit de Donac.

f)L.j.Quorum lega. ff L.non dubium.de lega C.& ibi DD.Parkins. tit.teſta.c. 7. fol.94.b.

And thirdly,becauſe the legacy is to be paid by the Executor or adminiſtrator, (as appeareth by the definition,) it is noted, † that it is not lawfull for the legatarie, to take his legacie by his owne ſole auctority[g],(onely the executor may of his owne auctority enter to the goodes and cattelles of the deceaſed,[h]) otherwiſe if the legatarie preſume to bee his owne caruer,& do enter to the poſſeſſion of thething bequeathed,without deliuery or cōſent of the executor,he therby loſeth his legacy[i]: except in certaine caſes, whereof hereafter[k]. Fourthlie,in that here is mention aſwell of the adminiſtrator as of the Executor, the meaning is, that † not onely thoſe legacies are dew, which are left in a teſtament, wherin is appointed an executor,and where the party doth not die inteſtate: But thoſe legacies alſo which are left in a Codicill or laſt will, wherein no Executor is appointed, and where the partie dyeth inteſtate[l]; which Legacies as they bee due, ſo are they payable in both caſes: in the one by the Executor; and in the other caſe by the adminiſtrator[m]. Nay more then this; if any legacie be left in a teſtament,although the executor therin named can not bee executor, or doe refuſe

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g)d.L.non dubium & Sichar.ibid.n.2.

h)Infr.6.§ j.& iij.

i)d.L. non dubium. C. de lega.

k)Infr.part.7.§.22.in fin.

l)§.non autem Inſtit. de Codicil.

m)Eod.§. non autem. & L..ab inteſtat.ff.de iure codicil.

the executorſhip, and ſo the partie die in a maner inteſtate, and thereupon adminiſtration of his goodes graunted, according to the ſtatutes of this realme[n]. In this caſe alſo by the lawes and cuſtome of this realme, the Legacies bee due and payable by the adminiſtrator[o], though it be otherwiſe by the ciuill lawe[p].

In auncient time † there were foure ſeuerall kindes of legacies. *Per vindicationem*[q], *per damnationem*[r], *per ſinendi modum*[s], *per præceptionem*[t]. 7
That is to ſay, by challenge, by condemnation, by ſuffering, by foretaking, being ſo diſtinguiſhed, by occaſion of a certaine ſolemnity or formalitie of wordes, aſſigned to euery kinde of legacie[v]: With ſeuerall actions or remedies, aſcribed to euery ſuch legacie, for the recouerie thereof[x]. But afterwardes the † lawes beeing more fauorable to dead mens willes, this pre- 8
ciſe ſolemnitye of wordes was taken away, and libertie graunted to make bequeſts by anie manner of wordes[y]. (As elſe where more fullie[z].) Whereby in the ende, all legacies bee came of one and the ſame nature, and are all at this preſent recouerable by like actions[a]. Which by the ciuill lawe is threefolde[b], with

n) Stat. 31. H. 8. an. 21. c. 5.
o) Brooke Abridg. tit. teſta. n. 20. inf. par. 7. §. 19.
p) L. j. in fin. de Iniuſt. teſta. L. fideicommiſ. de Leg. j. L. Imperator. de Leg. 2. ff. Graſſ. Theſaur. com. op. §. legatū. q. 8.
q) §. ſed olim. Inſtit. de lega.
r) Alij legunt per vendicationem, vt Porcius, & Minſing. in d. §. ſed olim.
s) i. obligationem, vel condemnationem.
t) i. ante captionem. Minſin. in d. §. ſed olim,
v) Accipe ſingulorum legatorum exempla, 1. Titius rem illam habeto. 2. Hæres meus damnas eſto dare. 3. Hæres meus ſinito Titium rem illam ſumere, ſibíque habere. 4. Hæres prædium illud præcipito. gloſſ. in d. §. ſed olim.
x) Legato videlicet per vindicationem relicto, actio realis: per damnationem verò perſonalis naſcebatur. Sinendi modo relictum, ſola legatarij autoritate ſine vitio capitur, legatum per præceptionem actione familiæ Herciſcundæ exigebatur. Minſing. & alij in d. §. ſed olim. (y) L. j. C. com. de lega. §. noſtra Inſtit. de lega. (z) Infr. part 4. §. 4. (a) d. §. noſtra. Inſtit. de lega. (b) Iure ciuili tres actiones Legatarijs competere dignoſcitur, perſonalem, realem, Hypothecariam. Iure autem quo nos vtimur, quin prima actio qua executor ex quaſi contractu teneatur, etiamnum vigeat, nulla eſt dubitatio. Secunda etiam qua rem Legatam perſequimur competit quidem Legatario primo aduerſus executorem, ſeu adminiſtratorem pro re tradenda, deinde adepta poſſeſſione, aduerſus quemlibet poſſeſſorem conceditur actio tranſgreſsionis. Tertiæ verò actioni qua res teſtatoris legatarijs pignorari dicitur, ſuſpicor nullum in hoc regno locum eſſe relictum.

vs if the executor detaine the legacie, or doe ſlacke the performaunce of the teſtators will. The legatorie muſt ſue the executor in the Eccleſiaſticall courte, for the ſame Legacye ſo detained or not ſatisfied [c].

c) Tract. de repub. Ang. lib. 3. c. 9. Bracton. de legib. & conſ. Angl. lib. 2. c. 26. in fin. Brook Abridg. tit. de viſe. n. 27. 45. Fitzherb Nat. Breu. fol. 50. in Br. de conſultac. in princ. Plowd. a caſ. inter Paramor & Yardley. Termes of law, verb. deuiſe.

The Definition of a gifte in conſideration, or becauſe of death.

1 *What is a gift in conſideration of death.*
2 *Three ſortes of giftes in conſideration of death.*
3 *Which of theſe three giftes is compared to a Legacie.*

§. vij.

1 A *Gifte in conſideration of death*, is † where a man mooued with the conſideration of his mortalitye, dooth giue and deliuer ſomething to another, to be his, in caſe the giuer dye; or otherwiſe if hee liue he to haue it a-
2 gaine [a]. Of † *giftes* in caſe of death there be three ſortes [b]. One when the giuer is not terrified with feare of any preſent perill, but mooued with a generall conſideration of mans mortalitie, giueth any thing [c]. Another, when the giuer being mooued with imminent daunger, doeth ſo giue, that ſtraight wayes it is made his to whom it is giuen [d]. The third is when anie being in peril of death, doeth giue ſome thing, but not ſo, that it ſhall preſently be his that re-
3 ceiued it, but in caſe the giuer doe die [e]. This † laſt kinde of gifte, is that which is compared to

a) Inſtit. de donac. in princ.

b) L. 2. ff. de donac. mor. cauſ.

c) d. L. 2. L. Seni. L. vbi ita. ff. de mor. cã. donac.

d) d L. 2.

e) Ibidem.

a legacie[f]: But the other two are reputed ſimple giftes: If the giuer doe not make expreſſe mention of his death, and ſo they can not bee reuoked[g], but take full effect from the time of the making of the gifte, if the ſame bee not fraudulent[h].

f) Bar. in d. L. ſeni. Graſſ. Theſaur. com. op. §. donatio. q. 1.

g) Iul. Clar. §. donatio. q 4.

h) Stat. Eliz. an. 13. c. 5. & an. 14. c. 11.

The Diuiſion of Teſtaments.

1 *Of the auncient diuiſion of teſtamentes.*
2 *An other threefolde diuiſion.*

§. viij.

FOraſmuch as that † auncient diuiſion of teſtamentes, whereby they † were firſt diſtributed into two ſortes[a], the one teſtament beeing tearmed *Calatis Comitijs*[b], the other *Procinctum*[c], (whereunto afterwardes a thirde kinde was added called *Per æs & libram*[d]) hath beene long ſince aboliſhed[e], and worne not onely out of faſhion, but almoſt out of memory; in ſo much that vnto ſome their very names may ſeeme ſtraunge. Vnwilling therefore to offer any thing, more tedious then profitable, I thought good to make reporte of ſome other kinde of teſtaments, whereof happely we may haue ſome vſe in England. 1 2

Vnderſtand therefore, that † of teſtamentes ſome be *Solemne*, ſome *vnſolemne*; ſome *written*, 3

a) Inſtit. de teſta. ordin. §. j.

b) i. vocatis comitijs, ſeu vocato populo, à græco verbo καλω, quod eſt voco. Tempore autemque pacis, bis tantùm in anno Teſtator conuocato per cornicinem populo, eóque præſente, ac quaſi teſte, vltimam ſuam voluntatem declarare ſolebat. Minſing. in d. §. j.

c) Hoc teſtamentum fieri conſueuit ab exituris in prælium ob dubiam belli aleam. Inde procinctum dicitur, nõ quòd ſuccincte fieret, ſed quòd procincti dicuntur milites quaſi præcincti & expediti. Viglius in d. §. j. (d) i. per imaginariam venditionem. præſentibus enim teſtibus, vnà cum libripende, ſeu eſtimatore patrimonij is qui ſucceſſor defuncti futurus erat, morituri bona emebat, deinde percutiẽs libram, illud æris quaſi pretium dabat ei à quo hæreditatem expectabat. Minſing. poſt Vigl. in d. §. j. (e) Text. in d. §. j.

ſome

some *vnwritten* or *noncupatiue*[f], some *Priuileged*, and some *not priuileged*[g].

f) Iure ciuili testamentum scriptum, non vocatur alia species a testamento solenni, plerunq; enim hæc duo confunduntur, & indifferenter, seu promiscuè vsurpantur. (Bar. in l. tabular. ff. Quemad. testa. app. & apertiùs. Minsing. in §. sed cum. Instit. de testa ord. & in §. fin. ibid. Grass. Thesaur. com. op. §. testa q. 10. n. 1.) At verò iure quo nos vtimur inspecto, plane diuersa sunt. Sæpiùs etenim necessarium est, vt testamenta nostra sint scripta, sed vt sint solennia nunq, quinimo vel cod. iure ciuili testamentum insolenne diuiditur in scriptum & non scriptum. Grass. Thesaur. com. op. §. testa. q. 10. & q. 11. n. 3. (g Mantic. de coniect. vlt. vol. lib. 1. tit. 7. Adde Iul. Clar. §. testm. q 3. vbi tradit nobis aliam testamentorum diuisionem.

Of Solemne Testaments.

1 *What is a solemne testament.*
2 *No vse of solemne testaments here in England.*
3 *The rigour of the ciuill lawe concerning testamentes.*
4 *This rigour iustely reformed.*
5 *What mooued* Iustinian *to exacte the number of seuen witnesses in testamentes.*
6 *Two or three witnesses sufficient by the law of God.*

§. ix.

1 *Solemne testamentes* are they †, wherin bee all those solemnities of the ciuill lawe, (as the presence of vij. witnesses, and required thereunto, their subscription, their subsignation, the expedition of the act at one time, &c.)

2 [a] But † of this kinde of testamentes, we haue no vse in England [b]. Wherefore it shall suffise, that I haue shewed (as it were onely by the pointing of the finger,) that such a kinde of testament there is mentioned in the Ciuill lawe; to

3 the † obseruation whereof the Romane people were

a) §. Sed cum paulatim Inst. de testa ordin. l. Hac consultiss. ma. C. de testa.

b) Supr. §. j. n. 1.

were ſtrictly tyed, in the making of their teſtamentes. (Much like as were the Iewes to their Iewiſh ceremonies:) ſo that if any one of theſe ſolemnities were omitted, the teſtament was voide[c]. Which thing was not onely hard to be performed, but in ſome reſpectes alſo vngodly. For that it was not ſufficient for any man, to prooue a teſtament by two or by three witneſſes, (the lawe of God requireth no moe[d]) but it muſt be prooued forſooth by ſeuen witneſſes[e]. Wherefore with † good reaſon, was this 4
exceſſe reformed: Firſt by the eccleſiaſtical law, which did reduce the number of ſeuen witneſſes to three, (the parochiall miniſter beeing one,[f]) & in ſome caſes to two[g]. And then by the general cuſtome of this realme, which diſtinctly requireth no moe witneſſes but two, ſo they be free from any iuſt cauſe of exception[h]. The reaſon † wherewith *Iuſtinian* was mooued, to 5
approoue of theſe ſolemnities, and to adde thereunto as he did, was as he doeth franckelie acknowledge, (*Propter teſtamentorum ſinceritatem, vt nulla fraus adhibeatur*[i].) For the ſincerity of teſtamentes, and that no fraude ſhoulde bee practiſed. And I doubt not, but before hee dyd ſet down ſo preciſe a law, he had ſufficient triall of great cunning, and craft practiſed, in the making and prooüing of teſtamentes. (I woulde there were none in England) which vrged him to goe from that rule †, and lawe of *Vlpian* the 6
famous lawyer, the ſame alſo being moſt agreeable to the lawe of God. *Vbi numerus teſtium non adȳcitur etiam duo ſufficiunt, pluralis enim elocutio,*

duorum

c) L. j. de Iniuſt. rupt. & irrit. teſt. ff. Minſing. in d. § ſed cum. n. 12.

d) Deut. c. 18. Matth c. 18. Mantic. de conjectu. v. l. lib. 6. tit 3. n. 18.

e) d. § ſed cũ paulatim.

f) c. cum eſſes de teſta. extr.

g) Teſta. videlicet ad pias cauſas condito. c. relatum el. j. de teſta. extr.

h) Lindw. in c. ſtatut de teſta. lib. 3. prouincial. conſtitu. verb. probatis. Peckius in c. priuilegiũ de reg. iur. lib. 6. n. 7.

i) d. § ſed cum paulatim. inſtit de teſta. ord.

duorum numero contenta eſt[k].) *Where the number of witneſſes is not expreſſed, euen two are ſufficient, for the plurall ſpeach is content with two.* Where hee ſayeth the plurall ſpeach is content with two, which is the reaſon of the lawe: It hath this ſence. It was a thing very well knowne, that *one witneſſe* alone, was not ſufficient to decide a controuerſie, (the teſtimony of one beeing as the teſtimonie of none[l];) and therefore there were required *witneſſes*, but how many witneſſes were ſufficient was doubted of: whereupon *Vlpian* anſwereth, that albeit witneſſes are required; Yet that plural ſpeach, *witneſſes*, is ſatisfied with two, and ſo two witnneſſes are ſufficient, where a greater number is not required[m].

k) L. vbi de teſtibus. ff.

l) c. licet c. veniens &c. Iuſiurandi de teſtibus. extr. c. admonere. 33. q. 2.

m) DD. in d. L. vbi.

Of vnſolemne teſtamentes, and whether the aforeſaid definition of a teſtament doe agree to our teſtaments in England.

1 *What is an vnſolemne teſtament.*
2 *Of the freedome we enioye in England, in makinge our teſtamentes.*
3 *Writing required in the deuiſe of landes.*
4 *Many thinges permitted which be not neceſſary.*
5 *Whether it be needefull that witneſſes bee required in a teſtament.*
6 *Whether our teſtamentes in England doe agree, with the former definition of a teſtament.*
7 *Some reaſons whereby it ſhould ſeeme, that the former definition, and our teſtaments doe not agree.*
8 *The former definition of a teſtament, doeth comprehend both ſolemne and vnſolemne teſtaments.*

9 *The*

9 *The reasons which proue that this foresaide definition doeth comprehend both testamentes.*

10 Vlpian *did flourishe before* Iustinian.

11 *The encrease or decrease of solemnities doe not make the testament to swarue from the former definition.*

12 *An vnsolemne mariage is a true mariage, in respect of the knot or essence of matrimonie.*

13 *A Military testament, though vnsolemne, is properly a testament.*

14 *A testament amongest children is properly a testament though vnsolemne.*

15 *A great inconuenience, if an vnsolemne testament were not properly a testament.*

16 *What is a testament properly so called?*

17 *In England our testamentes though vnsolemne, haue the effect of testamentes properly so called.*

18 *An answer to those reasons, which seeme to proue our testamentes doe not agree with the former definition.*

19 *The former definition is not of any speciall testament.*

20 *The conclusion.*

§. X.

VNsolemne *testamentes* are † so tearmed, 1
whereas the solemnities of the Ciuil law aboue mẽtioned, or any of them are omitted, at the making of the testament[a]: Without the which by the Ciuil law, the testaments were voyd[b], except in certaine cases. But † with vs in England they are not 2
void: for that our testaments are not subiect, to the

a) L. j. de iniust. rupt. & irrit. testa. ff.

b) d. L. j. L. Hic consul. tissima §. ex imperfect. C. de testa. Mynsing. in §. sed cum paulatim. Instit. de testa. ord. n. 12.

the ceremonies of the Ciuill law, but are made with all libertie and freedome, and as (one reporteth) *Iure militari*[c]: And ſo wee are no further tied then to the obſeruation of thoſe requiſites, that be neceſſary *iure gentium*[d]. Which 3 requireth but two witneſſes[e]: ſauing that in † a legacie or deuiſe of lande, writing is alſo neceſſarie, and that to bee made in the life of the teſtator[f]. How be it, it is not to be doubted, but that a man may make his teſtament in writing, wherein he diſpoſeth of his goodes onely, and ſo hee may vſe the teſtimonie of moe witneſſes then two. Alſo † if he will hee may procure the 4 witneſſes to ſubſcribe their names to the teſtament; yea to euery page of the teſtament, (if there be diuers) and it is a good & a ſafe courſe whereby many forgeries might be preuented, 5 or more eaſilie detected. But no † man is tied to the obſeruation of theſe cawtels[g], (except as before) no not ſo much as to require the witneſſes[h]: ſo beneficial are the laws of this realme to the ſubiectes of the ſame.

c) D. Smith. tract. de repub. Ang. lib. 3. c. 7. Quod tamē indiſtinctē non admitterem, quandoquidem multa priuilegia teſtamentis militaribus competere videantur, qualia ſunt cum duobus teſtamētis decedere, & id genus alia (de quibus infr §. xiiij.) quæ noſtratibus non licet vendicare. (vt eod. §. xiiij.) Et contra Rogatio teſtium quæ pro ſolennitate in militari teſto requiritur (communi interpretum calculo) ab Anglis teſtantibus, non ita neceſſario obſeruatur.

d) Milites ad ſolennitates tantum iuris gentium aſtringi videre eſt apud Dec. in l. milites C. de teſta. mil. poſt Bar. in L. j. C. de ſacroſan eccle. & DD. in L. j. ff. de mil. teſta. Quibus adde Tiraquel. de priuileg. piæ cauſæ. c. 3.

e) Dec. in d. L. Milites Mantic. de coniect. vlt. vol. lib. 6. tit. 3. n. 9 in f.n. (f) Stat. H. 8. an. 32. c. 1. (g) Lindw. in c. ſtatutum de teſta. lib. 3. prouincial; conſtit. Cant. verb. probat.

h) Ratio eſt quia rogatio teſtium nō eſt iuris gentiū aut diuini. Ab. Couar. & alij in c. relatum. el. j. deteſta. extr. Tiraquel. de priuilegijs piæ cauſæ. c. 3. quo poſito conſtat Anglos pleniore libertate frui in condendis teſtamentis, quā quæ vel ipſis militibus indulta fuit à iure ciuili: quo (ſi communi ſit credendū opinioni) rogatio teſtium eſt neceſſaria. Iul. Clar. §. teſtim. q. 58 quamuis non deſint qui contendunt rogationem huiuſmodi, non ad ſolennitatem exigi, ſed vt ex eo facilius diiudicari poſſit, Militem proferendo verba quæ ſonant in teſtm. ea deliberatè & ſeriò, animoque teſtandi, non ioco, non perfunctoriè protuliſſe, vt ſæpè ſolent aliàs. Tiraquel. de priuileg. piæ cauſæ. c. 3. Weſenb. cōſil. 38. n. 65. Adde quod in teſtamēto inter liberos, vbi attēditur ſolennitas iuris gentium, nō eſt neceſſariū vt teſtes ſint rogati. Graſſ. Theſaur. cō. op §. teſtm. q. 11. Clar. §. teſtm. q. 18. Dec. conſil. 610. Denique nec in teſto ad pias cauſas (in cuius confectionē adhibendæ ſunt iuris gentiū ſolennitates) requiritur vt teſtes ſint rogati, vt habet com. op. teſte Couar. in c. relatum. el. j. de teſta. & infr. §. 16.

But

But † here me thinkes a queſtion doeth of- 6
fer it ſelfe to be reſolued. If all our teſtamentes
in England be *vnſolemne*, and † if by the Ciuill 7
lawe regularlie, all vnſolemne teſtamentes bee
voide, in ſo much that if but one onely ſolem-
nity be omitted, the teſtament is no teſtament:
Howe doeth the definition of a teſtament a-
boue mentioned, borrowed out of the Ciuill
lawe, agree with our teſtamentes heere in Eng-
land, being al vnſolemne teſtamentes? It ſhould
ſeeme we had need to ſeeke a new definition, &
that I haue erred, together with other our com-
mon and temporall lawyers of this realme, in
borrowing that definition, which agreeth ſo
iuſt with their teſtamentes, with which teſta-
mentes our teſtamentes doe not agree. For if
the definition did agree with both teſtaments,
they ſhould agree betwixt thēſelues, but the te-
ſtaments doe not agree betwixt themſelues; &
therfore the definition doth agree but with one
alone: If it agree but with the one, and we con-
feſſe it doeth agree with their teſtaments, how
then can it agree with ours alſo?

i) L j. de iniuſto rup. & irrit. teſto. ff. L. ex imperfect. L. ſi vnus. de teſta. C.

To this queſtion breefely my opinion is this, 8
that the † definition doeth comprehend, both
ſolemne and *vnſolemne teſtaments*: and therefore
is agreeable to our teſtaments. The antecedent
I prooue thus †. The Definition (as appeareth) 9
was made by *Vlpian* [k], this *Vlpianus* † is one of 10
thoſe auncient lawyers, whoſe aunſwers, defini-
tions, rules, and concluſions, are contained in
the digeſtes [l], and who floriſhed no leſſe then
two hundereth yeeres before *Iuſtinian* [m]. Which

k) Vlp. in L. j. de teſta. ff.

m) Iuſtinian⁹ adeptu⁹ fuit Imperium an. Chriſti nato 527. Vlpianus autem floruit lōge ante, nimirum, tempore Alex. Seueri Imp. Ro. paulo plus CC. annis poſt Chriſtum natum. Cagnol. in L. vnic. ſi quis ius dicēti. ff

Iuſtinian

Iuſtinian did adde certaine other ſolemnities; without the which he ordained, that the teſtament ſhould be voide[n]. It muſt bee graunted therefore, that the definition being perfect, before thoſe newe ſolemnities were deuiſed, and agreeable to thoſe teſtamentes which had not theſe ſolemnities, becauſe as yet they were not: ſo nowe the ſame ſolemnities beeing taken away, the definition comprehendeth thoſe teſtamentes, which haue them not at this pre-
11 ſent, as it did thoſe other teſtaments which had them not at the beginning[o]. So that the † encreaſing or decreaſing of the number of ſolemnities, maketh not the teſtament to come neerer, or departe further from the definition[p]. Indeede the preſence or abſence of ſolemnities make the teſtamēt ſolemne, or vnſolemne, but
12 they doe not make it a teſtament, or no teſtament[q]. For † as an vnſolemne mariage is not therefore no mariage becauſe it is vnſolemne, (the baynes perhappes not being publiſhed, or the mariage not being celebrated in the face of the church, but priuately in a chamber, or ſome other rite or ceremonie therof being omitted,) but is neuertheles reputed for a true mariage[r], both in the eccleſiaſticall courtes, in reſpect of the knot or eſſence of matrimonie[s]; and in

n) §. ſed cùm paulatim verb. ſed his Inſtit. de teſta. ordin. L. iubem⁹. L. cum antiquitas C. de teſta.

o) Eadem enim ratio oppoſiti in oppoſito, ac propoſiti in propoſito. Socin. conſil. 16. lib. 3. n. 15. Euerard. loc. a contrarijs.

p) Nam differētia quæ eſt tantum ſecundum maius & minus, nō cō. ſtituit diuerſas ſpecies, & ſic nec diuerſas definitiones. L. fin. de fūd. inſtruct. legat. ff. Oldē. de culpa.

q) Si enim equus cæcus ſit equus ita vt cæcitas non faciat equum non eſſe equum, ſed nō eſſe oculatū, à fortiori teſtamenti inſolennitas, nō facit teſtā. nō eſſe teſtamētū, ſed non eſſe ſolēne à fortiori inq̄ quum cæcitas ſit defectus in iure naturæ, inſolennitas autem defect⁹ iuris tantum ciuilis. Nam illa requiſita de quibus in c. cùm inhibitio de clan. deſponſ. ext. non eſſe de forma & ſubſtantia matrimonij, vel legittimationis prolis. ſed de ſolennitate tantum, & ad ipſius decorem introducta poſt Theolog. & Canoniſtas prodidit Graniſ. conſil. ciuil. 168. & hanc op. communi calculo receptam dicit. Io. Lup. & Maſcard. de probac. verb. filius conclu. 798. n 8. Et licet hodie per concil. Tridentin. huiuſmodi mattimonia fiant irrita. Nos tamen ſequimur antiquum ius cōe. tanquam non mutatum. Stat. H. 8 an. 25. c. 19. (r) c. aliter. 30. q. 5. c. 1. de cland. deſponſ. extr. s) Abb. in c. 1. de cland. deſponſ. extr. Dec. conſil. 163. Couar. de ſponſal. ſecunda part. c. 6. in principio, n. 7. Lindwood. in c. Humana. de clandeſt. deſp. lib. 4. prouincial. conſtitut. Cant.

temporall

temporall courtes in respect of the wiues dower, and other legall effectes[t]: euen so an vnsolemne testament doeth still remaine a testament; when these solemnities do rather appertaine to the proofe, or apparaunce, then to the substance of the testament[v]. For it is not said in the definition; there must be this or that number of solemnities in the testament, onely it is requisite, that there be a iust number[x], that is to say, so many as the lawe requireth, and if the lawe require none, the definition requireth none; more then is sufficient for a due proofe[y].

If an vnsolemne testament were no testament, then *testamentum militare*, were no testament: for it is an vnsolemne testament[z]: And yet *testamentum* † *militare* is both in name and 13
nature a testament[a]. Likewise if an vnsolemne testament were no testament, then *testamentum inter liberos* were no testament; being vnsolemn and vnperfect[b]: But *testamentum* † *inter liberos* 14
though vnsolemne, euen properly, and by the Ciuill lawe, is a testament[c]. Besides this, † if an 15
vnsolemne testament were no testament, then (all the testamentes here in England being vnsolemne,) we should all die intestate[d]: And dying intestate, then (marke what an inconuenience would followe,) by the statutes of this realme, the administration of the goodes of euery man dying intestate, ought to be committed to the widdowe, or next of kinne to the deceased

t) Perk. tit. Dower. fol. sexagesimo pri. quod verum est iure hodierno. Licet olim regnante H. 3. & longe ante eum contrarium ius obtinuit. Fitzh. Nat. Bre. fol. 150.

v) Minsing. in d. §, sed cũ paulatim. Old. de Act. class. 5. in prin. Ripa. in L. Nemo. de leg. j. & Io. Crot. in eand. L. col 6. Quorum opinione hæ solennitates testamentariæ non ad substantiã sed ad probac. testi. pertinent: quæ quidem opinio sine difficultate procedit hîc in Anglia vbi istiusmodi solennitates omnino non sunt necessarię. licet fortasse alias contraria tanquã communis opinio locũ sibi vendicaret. Bar. in d. L. Nemo. Couar. in c. cum esses. de testa. extr. n. 8.

x) Iusta sententia.

y) Bou. in c. cum esses. de testa. ext. in fin. Soarez. lib. rec. Senten verb. testa. n. 72. Ias. in L. cunctos de summa. tri. C. n. 39.

z) Wesenb. in tit 'de testa. mil. ff. Bald. in L. filij. C. famil. Herciscun. n. 5.

a) Tit. de testam. mil. ff. Instit. & C. Vasquius de succes. crea. §. 21. n. 47. Thesaur. com. op. §. testam. q. 11. n. 2. vbi refert hanc op. esse com. ex Alex. Decio. Curtio Nat. Emanuele Costa, Vasquio. & alijs, cont. glos. in d. §. ex imperfecto.

(b) L. Hac consultissima. §. ex imperfecto. C. de testa. (c) Gras. (d) Instit. de hæred. quæ ab intestat in princ.

ceaſed. But the contrarie hath beene generally obſerued, that is to ſay, where an executor hath beene appointed, able and willing to vndertake the executorſhip; there the maker of this will, hath beene adiudged not to haue dyed inteſtate, and ſo the adminiſtration of his goodes hath not beene committed to the widowe, or next of kinne, according to the ſtatute, although the teſtament were vnſolemne, which adminiſtation otherwiſe, ought to haue beene cõmitted according to the ſaid ſtatute, as is aforeſaid [c]. And therfore by cõmon obſeruation alſo, an vnſolemn teſtamẽt is not no teſtament: but rather euen properly a teſtamẽt. For by the † opinion of the moſt & beſt writers that is cõ-
16 cluded to be properly a teſtament, the author
13 wherof can not be ſaid to die inteſtat: & whoſe executor therin named, is to ſucceede *ex teſtamẽto* [f]; though it be but in reſpect of the lawes or cuſtoms of the place wher the teſtamẽt is made
14 being cõtented with fewer ſolemnities then are
17 requiſit in other places [g]. Which † effect our vn-
15 ſolemne teſtaments haue wherin an able & willing executor is named: For neither he is reputed to die inteſtat, which appointeth ſuch an executor [h], but is plainely, euen in laws of ſtrict interpretatiõ (I meane the ſtatuts of this realme) tearmed a teſtator: Nether is the adminiſtratiõ of his goods cõmitted to the widdow, or next of kin, by the auctoritie of the ordinarie: according to the ſtatute as in caſe of one dying inteſtat [i]. But the executor deriuing his auctority frõ the teſtator onely, doth ſucceed in the place of

c) Id quod viridi obſeruac. fieri vbique conſpicitur.

f) Bald. in L. cunctos de ſumma trinitate C. n. 17. Sichard. in L. Hac conſultiſſima. §. ex imperfecto. C. de teſta. n. 5 in fin. Graſſ. Theſaur. com. op. §. teſta. q. 11. n. 2. Iul. Clar. § teſtm. q. 13. Euerard. conſil. 185 n. 8.

g) Andr. Gail lib. 2. practic. obſeruac. 123. Soarez. lib. recep. ſenten. verb. teſtm. n. 72. Baptiſt. Villabol. lib. com. op. verb. teſtm. n. 57. Gabr. Rom. lib. 4. tit. de teſta. conc. 4. Vaſq. de ſucceſſ. crea. §. 21. n. 47. 48. Pariſ. cõſil. 12. n. 45. vol. 3. quorum opinio eſt proculdubio communis; licet aliter ſentiat gloſſ. in d. §. ex imperfecto.

h) Hoc nemo neſcit qui vel mediocriter in alterutro foro verſatur.

i) Stat. Ed. 3. an. 4. c. 7. & an. 25. c. 5. ſtat: H. 8. an. 21. c. 5. & alijs penè infinitis locis.

k) Id quod non ſemel dictum eſt, ſed & ſepius eſt dicendum.

the dead man, by force of the testament, according to the testators meaning and disposition[l]. Wherefore an vnsolemne testament, is euen properly a testament. Which conclusion being true, the definition is not more proper to the one, then to the other.

l) Plowden in casu inter Greisbrook & Fox, fol. 280. his verbis: Lez executores nosmes sount executores magnetent & deuant probate del testament, Car le probate nest que confirmation & allowance de ceo que le testator fist, &c. Et ils poyent executeur deuant. probate, &c.

Now for the answering of the argumentes obiected. First † where it is obiected, that al vn- 18
solemne testamentes are voide, although one onely solemnitie were omitted. That is true onely by the Ciuill lawe: But it doeth not therfore follow, that an vnsolemne testament is no testament, in respect of his definition[m], how so euer it haue not the same effect, to all intentes in lawe. But if it bee therefore a testament, because it taketh effect in lawe, then are all our testamentes, (though vnsolemne,) good and sufficient testamentes; because they haue as much force without those solemnities, as if they had them al and C. more[n]. Secondly, where it is obiected, that the definition dooth agree to their testamentes; and that their testaments and ours doe not agree betwixt them selues: I answere, that the † definition is not of any speciall testa- 19
ment, that is to say, it is not of a solemne testament alone, nor of an vnsolemne testament alone, nor of a written testament alone, nor of an nuncupatiue testament alone, nor is conuertible with any speciall kinde of testament, mencioned in any part of the Ciuill lawe, from the which our testamentes made in England doo differ. For indeede if the definition were made of any speciall testament alone, mencioned in the

m) Vasq. de succeff. crea. §. 11. n. 48.

n) Soarez. lib. recep. sen. verb. testm. n. 72. Graff. d. §. testm. q. 11. Clar. § testm q. 13. And. Gail. lib. 2. pract. obser. c. 123. Vasq. de succeff. crea. §. 11. n. 47. Sichard. in L. Hac consultiff § ex imperfecto. C. de testa.

the lawe, from the which our teſtamentes doe differ: Then could not our teſtamentes differing from the teſtament defined, agree with the definition [o]. But the definition is of a teſtament which is alſo common to all thoſe, or any other kinde of teſtamentes, aſwell ſolemne as vnſolemne, as appeareth before: and therefore the teſtament ſo defined, although it bee ſpeciall in reſpect of the definition, yet is it generall in reſpecte of the ſeuerall kinde of teſtamentes aboue recited [p], and is verified of euery of them; ſolemne or vnſolemne, and ſo conſequentlie is common aſwel to our teſtaments as to theirs, diſtributing both name and nature to euery ſpeciall teſtament [q], howe ſo euer they
20 differ amongeſt them ſelues [r]. To † conclude therefore, we neede not to ſeeke any newe definition, but rather they themſelues, by reaſon of their newe ſolemnities, deuiſed ſince the making of the olde definition [s].

Indeed we haue not theſe ſolemne teſtaments of the Ciuill law, but that in reſpect we are the more happy, and our law the more godly.

o) Quod enim differt à definito, differt à definitione: vt, quod non eſt homo, non eſt animal rationale. Euerard & Olden. loc. à definitione. Io. Caſus Oxon. tract. de dialect. fo. 225.

p) Teſtim. ſuperius definitum genus eſt ſubalternum: Id quod poteſt eſſe & ſpecies & genus diuerſo tamen reſpectu; nimirum ſpecies reſpectu ſuperioris, id eſt, ſententiæ; Genus reſpectu inferioris, id eſt, paganici, & militaris: ſcripti, & nuncupatiui; ſolennis, & inſolennis teſtamenti. Huiuſmodi autem teſtamenta differũt non numero ſed ſpecie, & ſic teſtamenta, cuius ſupra eſt definitio poſita, genus eſt, quia prædicatur de pluribus differentibus ſpecie.

q) Id quod eſt generi proprium. Olde. Topic Legal. Loco a genere.

r) Species namque per formã diſcrepat à ſpecie. Conueniunt autem omnes ſpecies in ſuo genere. Olden. & Euerard. vbi ſupra.

s) Alciat. in L. j. C. de ſacroſanc. eccle. n. 12.

Of a written teſtament.

1 *What is a written teſtament.*
2 *A teſtament nuncupatiue is not made a written teſtament by after writing except in certain caſes.*
3 *Some thinges common both to a written and to a nuncupatiue teſtament.*
4 *Some thinges peculier to a written teſtament.*
5 *Deuiſe of landes, tenementes, or hereditamentes, is not good without writing.*

6 *In a written testement it is not necessarye that the witnesses be priuy to the contentes.*

7 *Causes wherefore testators many times would haue their willes secret.*

8 *In what manner the testament is to be made when the witnesses know not the contentes.*

9 *The witnesses must be learned, and must write their names on the testament, when they doe not know the contentes thereof.*

§.xj.

a)Testamentū in scriptis an sit alia species à testo solenni examinaui. supr. §.8. in margine.

b) Minsing. in §. sed cū paulatim. Instit. de testa. ordin.

Written[a] *testament*, is † that testament which at the time of the makinge thereof, is committed to writing[b]. By which wordes, *at the time of the making thereof:* are excluded † such testaments as are afterwardes put in writing. For beeing made first by worde of mouth they doe still remaine nuncupatiue, notwithstanding the reducing thereof to writing[c]: Vnlesse the testament being first made by word, and afterward (in the life time of the testator) being written, it were brought to the testator, and by him approoued for his testament: Or vnlesse the testator, when he declared his testament, did wil that the same should be written, & that thereupon the same was written accordingly, during his life. For then it is effectuall, for the deuise of landes, tenementes, and hereditaments, as if it had been written at the first[d].

1

2

Minsing. in §. fin. Instit. de testa. ord.

d)Dier. fol. 72. & ita sæpè audiui à nonnullis huius regni Angliæ iurisperitis.

A written † testament albeit it haue some thinges thereunto belonging, which also belong

3

long to a nuncupatiue teſtament, and ſo common to both; as the appointing of an executor, (without the which there can be no teſtament at all, neither written nor nuncupatiue [e],) and as the deuiſing or diſpoſing of goodes or cattelles (which may be done indifferently eyther by word or by writing: [f]) yet there bee † ſome thinges, which be proper and peculier to a writen teſtament. One is the † deuiſe or graunt of landes, tenementes, and hereditamentes; which can not paſſe by a nuncupatiue teſtament, or will without writing [g]: As doeth afterwardes more fully appeare, where is alſo ſhewed, what landes, and how much, may bee deuiſed by will [h]. An other thing peculier to a written teſtament is this: In a written teſtament † the teſtator hath this benefit; he maie conceale and keepe ſecreete the tenor or contentes of his will, from the witneſſes [i]: Which he cannot doe when he maketh a nuncupatiue teſtament. And therfore if the teſtator be loath to haue his will knowne, which thing happeneth very often †, either becauſe the teſtator is afraid to offende ſuch perſones as doo gape for greater bequeſtes then either they haue deſerued, or the teſtator is willing to beſtowe vpon them: (leaſt they peraduenture vnderſtanding thereof, would not ſuffer him to liue in quiet,) or elſe becauſe hee ſhould ouer much encourage others, to whom he meante to bee more beneficiall then they expected, (and ſo giue them occaſion to be more negligent huſbandes, or ſtewards, about their owne affaires,

e) Infr. part. 4. §. 2.

f) Supr. §. 9.

g) Stat. H. 8. an. 32. c. 1.

h) Infr. 3. part. §. 4.

i) L. hac conſultiſ. C. de teſta. & gloſſ. ibidem.

then otherwise they would haue beene, if they had not expected such a benefit at the testators hands) or for some other considerations. In these and like cases, after the testator hath written his will with his owne hand, or procured some other to write the same, he may close vp the writing, without making the witnesses priuie to the contents thereof; and shewing the same to the witnesses, he may say vnto them: *This is my last will and testament*, or *herein is contained my will*: and this is sufficient[k]. Neither is the testament therfore the lesse auailable, because the witnesses doo not know what is contained in the same[l], in case † the witnesses be able to prooue the Identity of the Writing; that is to say, that the writing nowe shewed, is the very same writinge which the testator in his life time, affirmed before them to bee his will, or to containe his will[m]. Otherwise the will can take no effect, through the defect of sufficient proofe[n]. And therefore † 9 least the will should perishe for wante of due proofe, when the testator would not haue the contents knowne, it is not onely requisite that the witnesses be learned, but expedient also that they write their names, on the backside, or some part of the testament[o], or vse some other like meanes, that they may be able to depose and testifie vndoubtedly, that the same is the very writing it selfe, which the testator affirmed to be his will, or to containe his will[p].

Whether a testament may be written with notes or figures, and whether it may be prooued

k) Authen. Et non obseruato. C. de testa. & DD. ibidem.

l) Minsing. in §. sed cũ paulatim. Instit. de testa. ord. Cui accedit Kling. in eund. tit. n. 8.

m) DD. in d. L. Hac cõsultiss. & in Auth. & nõ obseruato. C de testa. Couar. in c. cum tibi de testa. extr. n. 5. & inf. par. 4 §. 25.

n) Bar. & alij in L. si ita scripsero. ff. de cond. & demon. Paris. cons. 19. vol. 3. n. 25. 26.

o) Specul. de Instr. Edi. §. compendiose. n. 40. Kling. in tit de testa. ordin. Instit. n. 8. & 9.

p) Sichard. in Auth. quod sine. C. de testa. Couar. in c. cum tibi de testa. extr. Specul. vbi supr. & infr. part. 4. §. 25.

ued without witneſſes, by the hand and ſeale of the teſtator, with other like queſtions, is declared afterward [q]. q) Inſr. part. 4 §. 25.

Of a Nuncupatiue Teſtament.

1 *What is a nuncupatiue teſtament.*
2 *Wherefore it is called nuncupatiue.*
3 *Of the force and efficacie of a nuncupatiue teſtament.*
4 *At what time commonly nuncupatiue teſtamentes are made, and what is the reaſon.*
5 *Teſtamentes fauorablie expounded.*
6 *A nuncupatiue teſtament made diuers waies.*

§. xij.

1 A *Nuncupatiue* teſtament † is, when the teſtator without any writinge, doeth declare his will, before a ſufficient number of witneſſes [a]. And a) §. Fin. Inſtit. de teſta. ordin. L. Hæredes palam. ff. de teſta.
2 it is called nuncupatiue † *à nuncupando i. nominando*, of naming [b]. Becauſe, when b) Minſing. in d. §. fin. & Kling. in d. tit. de teſta. ordin. n. 11.
a man maketh a nuncupatiue teſtament, hee muſt name his executor, and declare his whole
3 minde before witneſſes [c]: And † a nuncupatiue c) Minſing. in d. §. fin.
teſtament, is of as great force and effecacie, (except for his landes, tenements, and hereditaments,) as is a written teſtament [d]. This kind d) L. Hac conſultiſſima §. per nuncupationem. C. de teſta. d. §. fin. Inſtit. de teſta. ordin.
4 † of teſtament is commonly made, when the teſtator is now very ſicke, weake, and paſt all
5 hope of recouerie [e]. For † (as one reporteth) it is receiued for an opinion amongſt the ruder e) Termes of law. verb. deuiſe.

and more ignorant people, that if a man should chance to be so wise, as to make his will in his good health, when hee is strong and of good memorie, hauing time and leasure, and might aske counsell (if any doubt were) of the learned; that then surely he should not liue long after. And therfore they defer it vntill such time, whē it were more conuenient to applye themselues to the disposing of their soules, then of their landes and goodes[f]. And † in consideration hereof it is, that testaments are so much fauored which be made in such perilous times; namely, for that the testator then cannot conueniently stay to aske counsell of such pointes as be doubtfull in lawe[g]. 5

f) Ibidem.

g) Infr. part. 4. §. 4.

A † nuncupatiue testament may bee made not onely by the proper motion of the testator; but also at the Interrogation of another, as is hereafter declared[h]. 6

h) Infr. part. 4. §. 26.

Of Priuileged Testaments.

1 *What is a priuileged testament.*
2 *Wherefore they be called Priuileged.*
3 *Diuerse sortes of priuileged testamentes.*

§. xiij.

Priuileged testamentes are those, † which are enriched with some speciall freedome or benefit, contrarie to the common course of law[a]. They bee tearmed † priuileged *à priui-* 1 2

a) Mantic. de coniect. vlt. vol. lib. 1. tit. 57. infi.

priuilegio quaſi a priuata lege[b]. For a priuiledge doeth ſignifie a priuate lawe. For as much therfore as by a priuate or ſpeciall lawe, ſome teſtamentes be diſcharged or disburdened, from the vſuall orders, or obſeruations of common or generall lawe: in that reſpect they are called priuileged.

b) Summa Hoſtienſ. tit. de priuileg in prin.

3 Of † priuiledged teſtamentes there are three ſortes, *Teſtamentum militare, teſtamentum inter liberos, teſtamentum ad pias cauſas*, a teſtament made by a Souldier, a teſtament made by a father amongeſt his children, and a teſtament made for good and godly vſes. And although there be ſome other priuiledged teſtamentes, yet their priuiledges are but ſmall in compariſon of theſe three[d].

d) Videlicet, teſtamẽta ruſticorum, teſta. tempore peſtis condita, & huiuſmodi, de quibus Ripa. in tract. de peſte. c. 2.

Of a Militarie Teſtament.

1 *The cauſes wherefore Souldiers enioy ſuch priuileges in making their teſtamentes.*
2 *Wherein Souldiers are priuileged concerning the making of their teſtamentes.*
3 *Souldiers priuileged in reſpect of their owne perſons and of others alſo.*
4 *Souldiers priuileged in reſpect of ſolemnities teſtamentarie.*
5 *Souldiers priuileged in reſpect of the ſubſtance and forme of a teſtament.*
6 *Three ſortes of men called Souldiers.*
7 *Whether all armed ſouldiers enioye theſe priuileges.*
8 *Whether doctors of the lawe, and clergie men enioy*

ioy theſe priuileges.

9 *The fruite which the common wealth reapeth by the ſtudie and practiſe of lawe.*

10 *What benefite doeth redounde vnto vs by the Cleargie.*

11 *Whether the ſouldier, or the lawyer are more honorable.*

12 *VVhat manner teſtamentarie priuileges Diuines and Lawyers doe enioy.*

13 *All Doctors and Diuines be not priuileged.*

§.xiiij.

FOr as much † as Souldiers being better acquainted with weapons then bookes, are preſumed to haue ſo much the leſſe knowledge in the lawes of peace, by how much they are the more expert in the lawes of armes [a]. For as much alſo as noble warriors, in the defence of their countrie, doe often times vndertake perilous enterpriſes, wherein they looſe their liues or their limmes; and ſeldome eſcape without woundes or bodily hurt [b]: As well therfore in regard of their ſmall skill, in our peaceable laws on the one ſide [c]; as in recompence of their great perilles and hurtes in furious and cruell battailes, on the other ſide [d]: They enioy manie notable priuiledges, and benefittes in the making of their teſtamentes, (eſpecially by the Ciuill lawe,) which are not allowed vnto others [e]. 1

Of theſe † priuiledges, ſome doe reſpect the perſon

a) L. fin. §. C. de iure de. lib in fin. Vigli. & Minſing. in tit. de teſta. mil. Inſtit.

b) L. quanquam C. de teſta. mil. & ibidē. Dec.

c) Inſtit. de mil. teſta. in princ. And. Gail. lib. 2. practic. obſeruac. c 118.

d) Dec. in d. L. quanquam C. de mil. teſta. Atque harum cauſarū prior eſt impulſiua, poſterior finalis. Gail. vbi ſupr.

e) Vaſquius de ſucceſſ reſoluc. lib. 2. §. 20. vbi enumerat Lxx. priuilegia militibus in ſulta.

perſon of the teſtator, ſome reſpect the perſon of the executor,or legatarie, ſome reſpecte the ſolemnities about the making of the teſtament, and ſome reſpecte the ſubſtaunce or forme of the teſtament made [f]. Concerning the firſt
3 kind of priuiledge, whereas † there bee manie which be diſabled to make their teſtament, (as afterwardes doeth appeare) [g]: Yet a Souldier is not diſabled by any of theſe impedimentes, vnleſſe it be by reaſon of furor, or lacke of reaſon,or forſome other cauſes,whē he is diſabled *Iure gentium* [h]. Concerning the perſon of the executor or legatarie: Whereas there bee dyuers which be prohibited to be executors, or legataries, to other perſons; yet they are not to be prohibited to bee executores or legataries to a Soldier (except in ſome fewe caſes [i].)
4 Concerning † the ſolemnities of the Ciuill lawe, to bee obſerued in the makinge of teſtamentes: ſouldiers are clearely acquited from the obſeruation thereof [k]: Sauing that in the opinion of diuers, Souldiers when they make their teſtamentes, ought to require the witneſſes to be preſent [l]. But for as much as no ſubiect of this land,is ſtrictly tyed to this obſeruation of requiring the witneſſes,in the making of his teſtamente [m], (thoſe onely ſolemnities beeing neceſſary which be *Iuris gentium* [n]:) Therefore that opinion is not to take place here in England;otherwiſe this abſurdity would followe, that Souldiers ſhould be tyed to more ſtrickt obſeruation,then men of greater skill; and enioye leſſe libertie, then they of leſſe deſerte [o].

f) L. neque enim ff. de mil. teſt. & ibi Bar. Sichard. in Rub. de teſta. mil. C. Mantic. de coniect. vlt. vol. lib. 6. tit. 1.

g) Infr. 2 part.

h) Bar. in d. L. Neque enim. Minſing. in tit. de mil. teſta. Inſtit in prin.

i) Bar. in d. L. neque enim, & infr. par. 5.

k) L. Diuus ff de teſta. mil. § plane. Inſtit. cod. tit.

l) Quorum opinio cōmunis ſt, vt refert Iul. Clar. §. teſtm. q. 18.

m) Supr. § j in prin. cum notat. ibidem.

n) Supr. §. x. in prin.

o) Vide quæ ſuperius dicta ſunt. §. x. n. 5. cum notis marg.

Con-

Concerning † militarie priuileges which reſpecte the forme and ſubſtaunce of the teſtament made: Firſt, whereas no other perſon, can die with two teſtamentes; yet a Souldier may, and both teſtamentes ſhall bee deemed good, according to the wil and meaning of the teſtator[p]. And whereas an other perſon, can not die partely teſtate and partly inteſtate; (at leaſt by the Ciuill lawe[q]) yet a Souldier may[r]. And therefore if a ſouldier make his teſtament, and therein appoint an executor for goods in one place, the next of kinne ſhall haue adminiſtration of goods in an other place[s]. But this priuiledge dooth alſo belong to euery ſubiect of this realme[t]. Other priuileges there bee, but it were to long to repeate them all[u]. 5

p) L. Quærebatur ff. de mil. teſta.
q) L. ius noſtrum de reg. iur. ff.
r) L. Miles C. de teſta. mil.
s) d. L. Miles.
t) Fitzherb. Abridg. tit. exec. n. 26. & infr. par. 4. §. 17. & §. 18.
v) Vide (ſi placeat) Vaſq. de ſucceſſ. reſoluc. lib. 2. §. 20. vbi enumerat 70. priuilegia, quæ militibus competunt.

After we haue viewed what priuiledges doe belong to Souldiers, it ſhall be expedient to ſhewe what manner of Souldiers they bee to whom theſe priuileges are graunted. Wherefore we are to vnderſtand, that there † be three ſortes of men, which be tearmed in law by the name of Souldiers. The firſt be *milites armati*, armed Souldiers: (ſuch as are aboue deſcribed) the ſecond be *milites literarij*, lettered Souldiers, as Doctors of the lawe: the third ſorte are *milites cæleſtes*, celeſtiall or heauenly Souldiers, as cleargy men and diuines: for ſo the lawe doeth tearme them[x]. Concerning the firſt ſort † eyther they be ſuch as lie ſafely in ſome caſtle or place of defence, not beſieged by the enimie, onely in readineſſe to be imployed, in caſe of inuaſion or rebellion, and then they doe not 6 7

x) Minſing. in Rub. de teſta. mil. In tit.

enioy

enioy theſe militarie priuileges[y]: Or elſe they be ſuch as are in expedition or actuall ſeruice of warres, and ſuch are priuileged[z], at leaſt during the time of their expedition[a], whether they be employed by lande or by water[b], and whether they be horſemen or footemen[c]. Concerning the other two ſorts of Souldiers, many are of this opinion, that they doe not enioy the foreſaid priuiledges[d], becauſe that they are not ſouldiers properly ſo called, but metaphorically[e]. Others are of a contrary opi-
9 nion; affirming † that the great paines, and ſtudious trauell of learned lawyers, (eſpecially doctors of lawe and ſuch like,) are no leſſe beneficiall to their countrie, then the hardy aduenturers, of thoſe armed ſouldiers. For that without lawes no common wealth can be gouerned: And in that reſpecte deſerue as great priuiledges as they[f]. Much † more then (by all
10 probabilities) are thoſe ſpirituall ſouldiers worthy of all priuiledges by whoſe praiers and interceſſions, the wrath of God is appeaſed, and victory many times obtained, and without whoſe miniſtery chriſtianity would quickly be ruinated and ſubuerted[g].

And yet doubtleſſe it is more doubtfull in lawe, whether theſe militarie priuiledges doe appertaine to teſtaments made by cleargy men, then if they were made by lawyers[h]. The reaſon may be, becauſe howſoeuer deuines be worthy: yet they bee otherwiſe rewarded, though not in this[i], which reaſon notwith-

y) Intellige ſtationarios & Limitaneos milites. de quibus Viglius, & poſt eum Minſing. in §. illis autem. Inſtit. de teſta. mil. & Iul. Clar. §. teſtim. q. 15. in fin. Adhibe duas alias micas ſalis, vnam ex Zaſio in L. Miles. ff. de re. iud. n. 5. alteram è Decio in Rub. de teſta. mil. C. n. 3.

z) L. Pen. C. de teſto. mil. Mantic. de coniec. vlt. vol. lib. 6. tit. 1. n. 32.

a) §. Sed hactenus. Inſtit. de mil. teſt. Clar. §. Teſta. q. 15. n. 4. And. Gail. d obſeruac. 118.

b) Michael. Graſſ. Theſaur. com. op. §. teſtim. q. 3. n. 1. Zaſ. in L. miles. ff. de re iud. n. 5. in fin.

c) Dec. in Rub. de teſta. mil. C. n. 5. Ripa. in L. centurio. ff. de vulg. ſub. n. 11.

d) Sichard. in Rub. de mil. teſt. C. 9. Iaſ. Ripa. & alij in L. centurio. inde vulg. ſub. ff. quoti op. com. eſt. vt refert. Vaſq. de ſucceſ. crea. §. 24. n. 23.

e) Minſing. in Rub. de mil. teſta. Inſtit. n. 2.

f) Michael. Graſſ. Theſaur. com. op. §. teſtim. q. 4. Alex in d. L. centurio qui tamen alijs fundamentis nititur.

g) Alex. in d. L. centurio. n. 18.

h) Ripa. in d. L. centurio. ff. de vulg ſub. n. 19. poſt Socin. Iaſon. Claud. & alios ibidem. & Matheſilla. not. 61. Graſſ. Theſaur. com. op. §. teſtim. q. 5. (1) Vaſq. de ſucceſſ. crea. §. 24. n. 31. in fin.

ſtan-

ſtanding dooth not ſo fullie ſatisfie. For if doctors and pleaders of the lawe be therefore priuileged, becauſe they be compared to ſouldiers [k]; for that like valiant champions, by force of learning, ſtrength of witte, and mightye power of eloquence, they defend their clients cauſes, againſt the ſubtilties, and iniuries of their aduerſaries: how much more ought our cleargie men diuines, our captaines in the ſpirituall warfare of this life, by meanes of whoſe ſacred miniſterie and vertue of whoſe godlye inſtruction, and might of preaching that powerfull and inuincible woorde: not our purſes, nor our bodies, but euen our ſoules are defended and in ſafetie, againſt the cruell aſſaultes of that bloudy and mortall enemie of man kinde, (who ſeeketh by all malicious meanes, like a roaring lion whom hee may deuoure) and againſt his huge hoaſt of wicked ſpirites, who neuer reſt day nor night, nor minute of an hower, but ſtill ſtriue with might and maine to ouerthrow vs, and to bring vs all to euerlaſting deſtruction: how much more, I ſay, are theſe our captaines in theſe ſo terrible conflicts, to be gratified and dignified, with all manner of military priuiledges [l]. Wherefore if the matter reſt vpon the iſſue of deſert & worthineſſe, without doubt of theſe three forenamed ſouldiers; the diuine is not the laſt, but the foremoſt. Concerning the other two, (the lawyer I meane and the ſouldier) whether of them deſerueth better of the common wealth, and whether is to bee preferred before the other

k) Gloſſ. & DD. in L. miles. ff. de re. iud. Mẽtionem autem feci nõ ſolùm de doctoribus, ſed de alijs etiam cauſidicis, propterea quòd licenciati ratione exercitij priuilegijs militaribus fruuntur. Teſte Ripa. in d. L. centurio. n. 18.

l) Arg. à min. ad ma.

ther, is a queſtion ſo incident to this controuerſie, and cleaueth ſo cloſe thereunto, that there bee fewe writers which handle the one, but they alſo touch the other [m]. In the determination whereof, if the interpreters of the lawe may be iudges in their owne cauſe, then the ſentence muſt needes be, *cedant arma togæ* [n].

Compariſons be odious. For mine own part, if you will giue me leaue, I will tell you a tale out of *Zaſius* [o], writing vpon this Q. which ſhalbe as true as any is in *Æſops* fables. A certaine painter (ſaith hee,) meaning by his arte to deſcribe the ſtrength of man, did paint a little man riding vpon a huge lion, as if a man were ſtronger then a lion. A lion paſſing by, demaunded of the painter, wherefore he made ſuch a picture. Becauſe (quoth the painter) my man is able to tame any lion, as eaſily as a horſe or an aſſe. Well ſir ſaid the lion, if we could painte, thou ſhouldeſt ſee a lion deuouring a painter. Eloquent men are as painters, valiant ſouldiers as lions: hither to in ieſt: But nowe in earneſt, yet without offence. It is not the golden chaine, nor the plume of fethers, nor the bigge lookes, nor the proud bragges, which make a right ſouldier [p]. Neither is it the long gown nor the graue beard, nor the ſtately geſture which make a good lawyer [q]. The counterfeit of either deſerueth no honour: be hee neuer ſo braue, neuer ſo graue. If both be as they ſhould, the præeminence in matters of warre is the ſouldiers; in matters of peace it is the lawyers [r]. In other matters, he is the more honorable, which doeth

m) Alex. Iaſ. Ripa. in d L. centurio. Vaſq. de ſucceſ. creat. §. 24. n. 31

n) Vaſq. in d. §. 24. n. 31 Iaſ. in L. pen. C. de pactis. n 4. Angel. Are. in §. fin. Inſtit de mil. teſta. Alex. in d. L. centurion. 14. & Ripa. ibidem n. 15. Panor. & Canoniſtæ in C. quando de magiſtr. extr. n. 3. Felj. in Rub. de maior. & ob. extr. col. 2.

o) Zaſ. in L. miles. de re. iud. ff. n. 8.

p) Zaſ. in d. L. miles. n. 5

q) Cucullus non facit monachum.

r) Zaſ. in d. L. centurio. n. 20. Alex. in cond. L. n 14. Gail. lib. 2. practic obſer. 115. n. 16.

doeth more honour the other. To returne to the former question, whether these souldier like lawyers may challenge these former testamentarie priuileges: we are to distinguish betwixt priuileges graunted to souldiers, (so properly called) in respect of their want of skill and ignoraunce in matters of that qualitie, (for such doe not belong to the learned;) and priuileges of prerogatiue or deserte. For these kinds of priuileges belong also to doctors and clergie men s: but † with this restriction; that as 13 they belong not to euery souldier, but onely to such as are in action: so they belong not to doctors vtterly *non proficient*, or clarkes vnlawfullie *non resident*, but such as painefully attend their profession, and diligently labour in their vocation t.

s) DD. in L. miles. & L. centurio. ff. de re iud. Michael Graff. Thesau. com. op. §. testm. q. 5. nu 5.

t) Graff. d. q. 5. Viglius in d. §. j. Instit. de testo. mil. Sichard. in L. fin. §. si quis vero. C. de codicil. n. 5.

Of the testament of the father amongest his Children.

1 *What is a testament amongest children.*

2 *That testament is presumed last which is made in fauour of children.*

3 *If two testamentes be found, and it doe not appeare which is first or last, neither is good.*

4 *The testament made in fauour of children, is not so easily reuoked as an other testament.*

5 *What manner mention is to be made in the latter testament, to take away the former made in fauour of children.*

6 *Certaine cases wherein the testament made in fauour of children, may be taken away by the second, without*

without any mention of the former.

7 *Whether a teſtament may bee prooued which hath no witneſſes of the making thereof.*

8 *The priuilege of proofe without witneſſes, whether it be peculiar to one kind of teſtament.*

§. XV.

THe ſecond kinde of priuileged teſtaments is, *teſtamentum inter liberos*; a teſtament amongſt children [a]: that is to ſay,† wherin the father nameth his
1 lawfull and naturall children his executors, giuing to them the reſidue of his goodes [b], vnto which kinde of teſtament diuers priuileges doe
2 appertaine [c]. The firſt priuilege is this, if† two teſtaments bee found after the death of the teſtator, of diuers tenores, and it dooth not appeare which of them is the latter teſtament, in this doubte that teſtament is preſumed the latter, and ſo ſhall preuaile, which is made in fa-
3 uour of the children [d]. Whereas if† neither be in fauour of the children, nor otherwiſe priuileged, neither teſtament ſhall preuaile, but both are voyd, the one deſtroying the other [e]: Vnleſſe the teſtaments be made by a ſouldier, for then it ſeemeth that both teſtaments ſhall preuaile, becauſe hee may, (if he will) die with two teſtamentes [f].

4 Another priuilege is this, the † teſtament made in fauour of children, is not ſo eaſily reuoked as other teſtaments are [g], for whereas in other teſtaments, the former is reuoked or in-

a) Mantic. de coniect. vlt. vol. lib. 1. tit. 7. in fin.

b) L. ex hac conſultiſſima. §. ex imperfecto. C. de teſta. & ibi DD.

c) d. §. ex imperfecto. & L. fin. C. famil. Herciſcun. Mantic. de coniec. vlt. vol. lib. 6. tit. 2.

d) Bar. in L. j. §. j. de bon. poſſ. ſecudũ tab. ff. Clar. § teſtm. q. 100.

e) L. fin. de hæred. Inſti. L. ius noſtrum. de reg. iur. & Cagnol. ibidem. n. 8. Bald. & Caſtr. in L. eum qui. de acquir. hær. ff.

f) L. quærebatur de teſta mil. ff. Bar. in d. L. j. §. j. de bon. poſſ ſecundum tab. ff.

g) Auth. hoc inter liberos. C. de teſta. & gloſſ. ibidem.

fringed by the latter, and that *ipso iure*[h]; without any expresse reuocation of the former, and without any kinde of mencion of the former testament either generall or speciall[i] (certaine causes excepted). Yet † by the ciuill lawe, if the 5
father haue once made a testament, wherein he hath preferred his children as before, the same is not reuoked by a latter testament, wherin straunger are preferred (whether the former be a written testament or nuncupatiue,) vnlesse in the latter testament there be speciall mencion of the former[k], so † that it is not sufficient 6
for the testator, to make generall mention, saying, I make this my last will, notwithstanding anie former testament, but he must make speciall mention, as notwithstanding any former testament made amongest my children[l], or vnlesse the second testament be made *ad pias causas*[m]: Or else some great displeasure, or enmity haue happened, betwixt the father and the children,[n] or some like cause haue come to passe, whereby it may appeare that the father did repent him of the making of his said will.[o]

An other priuiledge graunted by the ciuill law, to fathers testaments amongst his children is this, that the † same may take effect, albeit there be no witnesses to prooue the same; as when there is a testament found in some chist, or like place, written or subscribed with the testators hand, or by him procured to be written by some other[p]. Howbeit I doo suppose that by † the generall custome of this realme of 8
England, those two priuileges be not proper or peculier

h) § posteriore. Instit. quibus mod. testa. infir.

i) Inst. part. 7. §. 14.

k) d. Auth. hoc inter liberos. Alex. Iaſ. Sichar. ibidem. quorum opinio communis est contra Angel. vt inquit Graſſ. Thesaur. com. op. §. testm. q. 86. n. 11.

l) Mantic. de coniect. vlt. vol. lib. 6. tit. 2. n. 19. & Sichard. in d. Auth. Hoc inter.

m) Graſ. in d. Auth. hoc [illegible].

n) Graſſ. Thesaur. com. op. §. testm. q. 86. n. 11.

o) Graſſ. ibidem.

p) Bald. Paul. de castr. & Iaſ. in Auth. quod sine C. de testa.

peculier to fathers teſtaments alone, but that the ſame are common to al other Engliſh mens teſtaments, and namely the latter priuilege: when it dooth appeare vndoubtedly, to bee written or ſubſcribed with the teſtators owne hand, or is prooued that the teſtator cauſed the ſame to bee written by another. Howe this proofe is to be made, that the teſtament is written or ſubſcribed with the teſtators own hand, is declared in another place [q].

q) Infr. part. 4. §. xxv.

Other priuileges there be, wherby theſe kinds of teſtamentes are free, from ſundry obſeruations and ſolemnities, wherewith other teſtamentes are charged. But becauſe they are alſo common to all our teſtaments here in England; it were improper to repeate them in this place vnder the title of priuileges.

Of a teſtament *ad pias cauſas.*

1 *A teſtament* ad pias cauſas *may be ſo tearmed either in reſpect of perſons or places.*

2 *A teſtament* ad pias cauſas *may bee made by ſtraung and vnaccuſtomed notes.*

3 *A teſtament* ad pias cauſas *being found cancelled, is not preſumed to bee aduiſedly cancelled by the teſtator.*

4 *In a teſtament* ad pias cauſas *whether the condition ought to be obſerued preciſely.*

5 *A teſtament* ad pias cauſas *is not voyde by reaſon of vncertaintye.*

6 *Whether all priuileges which belong to a militarye teſtament, or to a teſtament amongeſt the teſtators children, doe alſo belong to a teſtament* ad pias cauſas?

7 *What if there appeare two priuileged teſtaments, and it doeth not appeare which is later, whether ſhalbe preferred.*

§. XVJ.

THe third kind of priuileged teſtaments, is that teſtament *ad pias cauſas*[a]: Which is ſo tearmed † not 1
onely in reſpecte of perſons, (as when the teſtator willeth his goods to be diſtributed to younge Orphanes, widdowes, ſtraungers, priſoners, lame, and diſeaſed perſons, ſo that they be poore and needie, ſuch as the law tearmeth *miſerable perſons*:) but alſo in reſpect of places[b]: as when the ſame is lefte to hoſpitalles, to churches, to repairing of high waies, bridges, walles of a towne or citie when the ſame bee decaied, and ſtand in neede to be repaired[b], and ſuch a teſtament hath very many priuileges[c].

One priuilege is, that † this kind of teſtament 2
may be written with ſtraung & vnaccuſtomed characters, or notes; as in ſteed of A. the firſt figure 1. in ſteed of B. the ſecond figure 2. in ſteed of C. the third figure 3. or with ſome other more ſtraung deuiſed letters. Yet neuertheleſſe the

a) Mantic. de coniect. vlt. vol. lib. 1. tit. 7. in fin. & in lib. 6. tit. 3.

b) Lindw. in c. ita quorundam verb. pias cauſas de teſta. lib. 3. prouincial. conſtituc. Cant. & latiſſimè Tiraquel. tract. de priuileg. piæ cauſæ. in præfac. eiuſd.

c) Tiraquel. in d. tract. vbi enumerat 170. priuilegia piæ cauſæ, quarum tamen longe maxima pars competit ſingulis Anglorum teſtamẽtis, etiamſi non ſint condita ad pias cauſas.

the ſame is as effectuall as if it hadde beene written after the vſuall and accuſtomed manner[d].

d) Mantic.de coniect. vlt.vol.lib.6.tit.3.n.3. Tiraquel.de priuileg. piæ cauſæ.c.12.vide inf par.4.§ 25.

3 An other priuilege is this, that if the † teſtament *ad pias cauſas* be found cancelled and it is not known, whether the teſtator did willinglie and wittingly cancell the ſame; the law doth preſume it to bee cancelled vnaduiſedly[e], and ſo it is in effect, as if it had not beene cancelled at all, whereas in other teſtaments, the contrarie is preſumed: that is, that the teſtator did wittingly and willingly, cancell the ſame[f]: whereby they are made voyd, as afterwarde is declared[g].

e) Couar.in Rub. de teſta.3.part.n 19. Grauetta.conſil. 128. Mantic.de coniect.vlt. vol. lib.12.tit.1.n.32.

f) Alex.conſil.104 n.6 vol.7. Mantic.de coniect.vlt vol.lib.12. tit.1. num.30.

g) Infr.part.7. §.16.

An other priuilege is, that for the obtaining of any thinge lefte condicionallie *ad pias*
4 *cauſas*, it † is ſufficient the condition bee accompliſhed by other meanes, then according to the preciſe forme of the condition[h]: Whereas in other teſtamentes or legacies, it is not ſufficient, vnleſſe the condition bee preciſelye obſerued[i].

h) Tiraquel.de priuileg. piæ cauſæ. c.83.

i) L. Meuius. I. qui hæredi de cond. & demo. ff. vide inf. par 4.§.7.

5 An other priuilege is, that the † teſtament *ad pias cauſas* is not voyd in reſpect of vncertaintie, (as other teſtamentes are:) and therefore
» if the teſtator ſay, I make the poore my execu-
» tors, or I will that my goodes be diſtributed a-
» mongeſt the poore: ſuch manner of appointing Executors or legacies is not voyd[k].

k) Bar. & Iaſin L. j C. de ſacroſa. eccle. Graſſ. Theſaur. com. op. §. Inſtitut. q.12.

6 Generallie I ſuppoſe, that † whatſoeuer priuilege dooth belong, eyther to a Militarie teſtament, or to a teſtament made by the fa-

ther amongest his children, in respecte of the solemnities to bee obserued in the making of testamentes [l], or the substance of testaments [m]; that the same doe also appertaine to a testament *ad pias causas*, sauing in some cases, and namely, where the priuileges of both the former kindes of priuileges be contrarie, as where two testamentes bee extant, and it dooth not appeare which is former or latter. In which case it seemeth, that if they bee militarie testamentes, that then they are both good, otherwise they are both voide [n]: But if the one of them be *ad pias causas*, then that is presumed last and so auaileable, the other not being priuileged [o].

But † what if both testamentes bee priuileged, the one being *inter liberos*, the other *ad pias causas*, and it dooth not appeare, which is former or latter; which shall preuaile? I suppose that which is *inter liberos* [p], for the children are to succeede in case both the willes were voide [q], and so haue a double helpe, the one of the testament, the other of prouision of law [r]. And it were harde to take the testators goodes from his children, vnlesse it did plainelye appeare that the other were the latter [s]. How bee it, it seemeth that if the testament were not in fauour of his children, but of some other of his kinne; that then the testament *ad pias causas*, were to bee preferred; vnlesse they did prooue the testament made in their fauour to be the latter [t]. 7

Of

l) Iure ciuili non valet testū ad pias causas, absque solennitatibus conditum, secus iure communi modò adhibeatur solennitas iuris gentium. & hæc est communis opinio. Graff. Thesaur. com. op. § testū. q. 18. Boer. Dec. s. 93. n. 3. vnde non requiritur, vt testes sint rogati in confectione testū ad pias causas, vt habet communis opinio. Testibus Couar. in c. relatum. el. j. de testa. extr. n. 4. Tiraquel. de priuileg. piæ causæ. c. 3 & Graff. d. q. 18. n. 5.

m) c. cum tibi de testa. extr. Quid autem respectu personæ testantis? Dic, vt per Iu. Clar. § testū. n. q. 5.

n) Supr. § 14.

o) Ias. & Sichard. in L. fin C. de edict. D. Adrian. tollend.

p) Mantic. de coniect. vlt. vol. lib. 6. tit 3 n. 43.

q) Bar. in L. j. §. de bon. poss. secundum tab. ff. stat. H. 8. an. 21. c. 5.

r) L. vtrum. §. vlt. ff de minor. Alexat de præsūp. reg. 3. presūp. 43. n. 3

s) Vnde August. Quicūque (inquit) vult exhæredato filio, hæredē facere ecclesiam alium patronum quærat q̄ Augustinū c. vlt. 17. q. 4

t) Mantic. de coniect. vlt. vol. lib. 6. tit. j. n. 43.

Of teſtamentes vnpriuileged.

1 *Vnpriuileged teſtaments what they are.*

§.xvij.

1 VNpriuileged teſtamentes are they †, which haue not any freedome or benefite contrarie to the common courſe of ordinarie lawe, but are tied to ſuch obſeruations as the law requireth, and hath appointed regularly for all teſtaments. Of which formes wee ſhall diſcourſe heereafter; when oportunitie ſhall ſeruc.

Notes out of ye first parte

Testm est sicut testatio mentis. A testifieing or
witnessing of ye minde 1a parte cap: primo
Euit testam is a last will, but euie last wille is not a
testam eod cap: the difference
A last will is a gen all words, & accordeth to euie sewall
kinde of last wille, e testam eod cap: But
A testam properly and stood is one kinde of last wille, euery
that whereby ex is named, for by nameing an ~
ex, it differeth from the rest. eod cap

The definition of a testament

Testim, est voluntat- nre iusta sua de eo quod quis ye
morte sua fieri vult: A testam is a iust sentence of
o will touching that we would have done after o death: c: 2o.

The definitiō of a last will.

Vltā vo est iusta dispositio de eo quod quis ye mortem
fieri vult: A last will is a iust disposition of that wch
any would have done after death: eod cap 4o
A last will is of any force sine aia disponendi
as more then is the testam: sine aia testandi eod c:

The definition of a codicill

Codicillus est vol nre iusta sua de eo quod quis ye morte
suam fieri velit, absq; ex hib constituendo c: 5o.

If a man be accustomed to speak prodigally or incidently
& in his perfect health be demanded who shalbe his ex
or haue his goods, for that to haue done this is not
to be taken for a testam or last will, unles it be proued
he had animū testandi whē ye words were spoke c: 3.
A nūcupative testam is ye, wch is made by words only
without writing & it is called nūcupativū a nūcupando: i:
nominando or naming.
Testam are to be taken rigorously are inuented to some pious
vse, & ought rightly to be framed according to ye
lawe. Testam dicitur a testificio quasi a testando
for ex testificio — testificio is nothing but a proofe by
quere pro cetera ex parte ipso

THE SECOND PART OF THIS TESTAMENTARIE TREATISE:

WHEREIN IS DECLARED *what persons may make a Testament, and who* may not so doe.

The Paragraphs, or Chapters of the second parte.

Whether euery person may make a testament §.1.
Of Children §.2.
Of madfolkes and lunaticke persons §.3.
Of Idiots and fooles §.4.
Of olde men §.5.
Of him that is drunk §.6.
Of Slaues and villaines §.7.
Of Captiues and prisoners §.8.
Of a woman couert §.9.
Of those which be deafe and dumbe §.10.
Of him that is blinde §.11.
Of traitours §.12.
Of Felons §.13.
Of Heretikes §.41.
Of an Apostata §.15.

Of

Of manifeſt vſurers §.16.
Of inceſtuous perſons §.17.
Of Sodomites §.18.
Of a libeller §.19.
Of him that killeth himſelfe §.20.
Of him that is outlawed §.21.
Of an excommunicate perſon §.22.
Of prodigall perſons §.24.
Of him that hath ſworne not to make a teſtament §.25.
Of him that is at the very point of death §.26.
Of eccleſiaſticall perſons §.27.
Of Kinges §.28.

VVHE-

WHETHER EVERIE PERSON MAY MAKE A TESTAMENT.

The ſecond part.

1 *Euerie perſon may make a Teſtament which is not forbidden.*
2 *Diuers perſons forbidden to make their teſtaments.*
3 *Some forbidden for want of diſcretion.*
4 *Some forbidden for want of freedome.*
5 *Some forbidden for want of their principall ſences.*
6 *Some forbidden by reaſon of ſome hainous crime.*

§. j.

IN the ſecond part of this Teſtamentarie treatiſe, ſhalbe declared (God willing) what perſon maye make a teſtament, & who may not ſo do.

1 Wherein it maye be ſet downe for a rule, that † euery perſon

ſon (both man and woman, Chriſtian & Iewe, ſound or ſicke; and generally of what ſtate or condition ſo euer he, or ſhe be) hath full power and liberty to make a teſtament or laſt will [a], and may therein diſpoſe of his goods and cattelles [b], ſauing ſuch perſons onely as be prohibited by law or by cuſtome [c].

Therefore if we ſhall diligentlye examine, what perſons are forbidden by lawe or by cuſtome, it will eaſely appeare who they are that can make a teſtament, or diſpoſe of their goods and cattelles. And albeit † many perſons are 2
forbidden by lawe, or cuſtome to make teſtamentes [d], yet they are reduced of ſome vnto fower or fiue ſortes [d]. Amongeſt the firſt † are 3
comprehended ſuch as *want diſcretion* or iudgement, as children [e], madde folkes [f], and idiots [g], to whom alſo I may ioyne thoſe perſons who be ſo very olde, that they become childiſhe againe [h], and him that is drunke [i].

Amongeſt the ſecond † ſort are comprehen- 4
ded ſuch *as lacke freedome, & full liberty*, as bondſlaue, ſlaues, and villeines [k], vnto whome may be added captiues and priſoners [l], and women couert [m].

In the third ſort † are contained ſuch as *lacke* 5
ſome of their principall ſenſes, namely ſuch as bee dombe and deafe [n], and blinde [o].

Among the fourth ſorte † are placed ſuch as, 6
for *ſome heinous crime*, are depriued of abilitie, of making of teſtaments, as traitors [p], felons [q], heretikes, [r], apoſtataes [s], many others [t].

And

a) Inſtit. Quibus non eſt permiſſum teſta. fac. in prin. & gloſſ. ibidem. Simo de Prætis de inter. vlt. vol. lib. 2. inter. 1. fol. 4. Vaſq. de ſucceſſ. progreſſ. lib. 1. § j. Michael Graſſ. Theſaur. com. op §. teſtm. q. 20.

b) Quibus enim permiſſum eſt teſtari eiſdem, & codicillari, & legata relinquere. Roland. tract. de codicil. n. 6 Michael. Graſſ. Theſaur. com. op. §. Codicil. n. 2.

c) Eſt enim edictum de teſtamẽtis phibitoriũ certarum perſonarum gloſſ. in §. Inſtit. Quibus non eſt permiſſum teſta. fac. Graſſ. Theſaur. com. op. teſtm q. 20. n. 1.

d) Bar. & Bald in L. Si quæramus ff. de teſta.

Lindw. in c. cum viris de teſta. lib. 3. prouincial conſtit. Cant.

e) Infr. ead. part. §. 2.

f) Infr. ead. part. §. 3.

g) Infr. ead. part. §. 4.

h) Infr. ead. part. §. 5.

i) Infr. ead. part. § 6.

k) Infr. ead. part. § 7.

l) Infr. ead. part. §. 8.

m) Infr. ead. part. § 9.

n) Infr. ead. part §. 10.

o) Infr. ead. part. §. 11.

p) Infr. ead. part. §. 12.

q) Infr. ead. part §. 13.

r) Infr. ead. part §. 14.

s) Infr. ead. part. §. 15.

t) De quibus infr. ead. part. §§. 16, 17, 18, 19, 20 21, 22.

7 And laſt of all, others † for other cauſes hereafter ſpecified ".

v) Infr. ead. part §§. 23. 24. cum ſequentibus. vide Io. ab Imol. in c. qua ingrediẽtib⁹. de teſta. extr. vbi hæc ſunt carmina: *Teſtari nequeunt impubes, religioſus, Filius in ſacris, mortis damnatus, & obſes, Crimine damnatus, cum mutо ſurdus, & ille, Qui maieſtatem læſit, ſit cæcus & ipſe.*

Of Children.

1 *At what age a teſtament may be made of landes.*
2 *At what age a teſtament may be made of goods.*
3 *What if the minor be* doli capax, *or a ſouldier, or the teſtament be* ad pias cauſas.
4 *What if the teſtament be made with the auctoritie of the tutor.*
5 *What if the teſtator doe liue vntill he come to lawfull age.*
6 *A boye after* 14. *yeeres, a woman after* 12. *maie make a teſtament of their goods.*
7 *VVhat if the laſt day of the yeere be not finiſhed.*
8 *VVhat if the teſtament made during minority, bee approoued by the teſtator after he be of full yeeres.*

§. ij.

IF we wil vnderſtand when a child may make his teſtament, we muſt diſtinguiſh whether the teſtament be of *landes*, or of *goods*.

1 If of landes † it is prouided by the ſtatutes of this realme, that willes or teſtamentes made of any mannours, landes, tenementes, or other hereditaments, by any perſon within the age of 21. yeeres, ſhall not bee taken

to

to be good or effectuall in law[a], for vntill that time, by the common laws of this realme, they be accompted infantes[b].

If† of goodes we muſt diſtinguiſh, whether 2
the child bee man or woman. A boye cannot make his teſtament before hee haue accompliſhed the age of 14. yeeres, nor a wench before ſhe haue accompliſhed the age of 12. yeeres[c]. In ſo much that† if before theſe foreſaide yeeres 3
they were of that ripeneſſe of witte, that they were *doli capaces*, capable of deceite, or able to diſcerne betwixt good and euill, and betwixte trueth and falſehood, yet could they not make any teſtament, nor diſpoſe of their goods[d]: or if the boy were of that ſtrength, that he were a ſouldiour, notwithſtanding thoſe great priuileges which doe belong to ſouldiours in making of their teſtamentes: yet could not hee make his teſtament, before he had accompliſhed his age of 14. yeres[e]. Neither can a boy before hee haue accompliſhed 14. yeeres of age, nor a wench before ſhe haue accompliſhed 12. make a teſtament *ad pias cauſas*[f]: Neither† is the teſta- 4
ment good, made by the boy or wench before the ſaid ages, although the ſame ſhould bee made by the auctoritye or conſent of the tutor[g]: neither dooth† the teſtament become 5
good, being made in their minorities reſpectiuely aforeſaid, albeit they ſhould afterwardes attaine to their ſeuerall ages, wherein they might make their teſtaments[h].

Howbeit† a boy after the age of 14. yeeres, 6
and a wench after the age of 12. yeeres, maie make

a) Stat. H. 8. an. 34. c. 5.

b) Doct. & Stud. lib. j. c. 21. lib. 12 c. 28.

c) L. qua ætate. ff. de teſta. §. præterea. Inſtit. quibus non eſt permiſſum. teſta. fac. L. ſi frater. C. qui teſta. fac. poſſ.

d) DD. in d. L. qua ætate, quorum opinio cõmunis eſt, vt aiunt Graſſ. Theſaur. com. op. §. teſtm. q. 20. & Viuius eod. lib. verb. pupillus. n. 7.

e) L. vlt. C. de teſtõ. mil. Graſſ. & Viuius vbi ſupra. referentes hanc op. eſſe com.

f) Iaſ. in L. ſi frater qui teſta. fac. poſſ. C. atque hæc opinio communi calculo comprobatur. Iul. Clar. §. teſtm. q. 5. & Graſſ. §. teſtm q. 17.

g) Iaſ. in d. L. ſi frater. C. qui teſta. fac. poſſ.

h) §. præterea. Inſtit. quibus non eſt permiſ. teſta fac. L. ſi filiuſ familias ff. qui teſta. fac. poſſ.

make a teſtament and diſpoſe of their goodes and cattelles [i], and that not onely without the auctoritie or conſent of their curator or garden [k], but alſo without the auctoritie and conſent of the father, if he haue any goodes of his owne [l]. Or if † he or ſhe haue attained to the
7 laſt day of 14. or 12. yeres, the teſtament by him or her, in the very laſt day of their ſeuerall ages aforeſaid is as good and lawfull, as if the ſame
8 day were already then expired [m]. Likewiſe † if after they haue accompliſhed theſe yeres of 14. or 12. he or ſhe doo expreſlie approoue the teſtament made in their minoritie, the ſame by this new will, and declaration is made ſtronge and effectuall [n].

i) d. L. qua ætate ff. de teſta. Perkins. tit. deuiſe. fol. 97. quamuis impreſſi. ſit vicioſa. vz. litera (x) omiſsâ, nam quod ſic ſcribitur, iiij. ante ſcribi debuit xiiij. ans.

k) Iaſ. in L. ſi frater. qui teſta. fac. poſſ. C.

l) Verum quidem eſt, quod iure ciuili filiusfamilias teſtari neque at ob illam patriam, cui ſubijcitur, poteſtatem. At verò in Anglia ceſſat perampla hæc poteſtas & prærogatiua. trac. de repub. Angl. lib. 3. c. 7. & ſic ceſſante cauſa, ceſſat effectus.

m) d. L. qua ætate. & ibi Bar.

n) Paul. de caſt. & alij in L. ſi frater qui teſta. fac. poſſ. C.

Of madde folkes and lunaticke perſons.

1 *Madde and Lunaticke perſons cannot make a teſtament, and what is the reaſon.*

2 *Whether the teſtament made in the time of furour be good when the teſtator is come to himſelfe.*

3 *A teſtament may be made by a Lunaticke perſon, betwixt his fittes.*

4 *Euery one is preſumed to be of perfect minde and memorie, vntill the contrary be prooued.*

5 *He that obiecteth inſanitie of minde muſt praoue the ſame.*

6 *Whether it be ſufficient to prooue that the teſtator was madde before the making of the will.*

7 *Whether he that is once madde bee preſumed ſo to continue.*

8 *Inſanity*

8 *Inſanity of minde hard to be prooued.*
9 *Witneſſes muſt yeelde a reaſon if they will prooue a man to be madde.*
10 *Argumentes of madnes.*
11 *Whether a generall reaſon ſuffice to prooue inſanitie of minde.*
12 *Whether madnes may be prooued by ſinguler witneſſes.*
13 *Thoſe witneſſes are to be preferred, which depoſe that the teſtator was of ſound minde.*
14 *What if the teſtament be made by a lunatike perſon, and the time of the making vnknowen, whether is the teſtament good or no?*
15 *What if it cannot be prooued that the teſtator had quiet intermiſſions.*
16 *What if there be a mixture of wiſe things and foliſh in the teſtament.*

§.iij.

MAdfolkes † and Lunaticke perſons, during the time of their furor or inſanitie of minde, cannot make a teſtament, nor diſpoſe anie thing by will [a], no not *ad pias cauſas* [b]: the † reaſon is moſt forcible, becauſe they knowe not what they do [c]: for in making of teſtaments, the integrity or perfitnes of minde & not health of the body is requiſite [d]; and there vpõ aroſe that common clauſe, vſed in euery teſtament almoſt, *ſick in body, but of perfit minde & memory* [e]. And ſo † ſtrong is this impediment of 1 2 3

a) §. Præterea. Inſtit. quibus non eſt permiſſum. L. furioſum. C. qui teſta. fac. poſſ. L. nec codicillos C. de codicillis.
b) Bar. in L. j. C. de ſacroſanc. eccle. n. 16. Dec. in d. L. furioſũ. & hæc opinio cõmuniter eſt recepta. Iul. Clar. §. teſtãm. q. 5. Graſſ. §. teſtãm. q. 17.
c) Graſſ. d. §. teſtãm. q. 21. in prin.
d) L. ſenium. C. qui teſta. fac. poſſ. (e) Minſing. in d. §. præterea Inſtit. quibus non eſt permiſſ. quæ tamen clauſula non eſt adeo neceſſaria, vt ſemper obſeruetur.

in-

inſanitie of minde, that if the teſtator make his teſtament after this furor haue ouer taken him, and whiles as yet it doeth poſſeſſe his minde, albeit the furor afterwardes departing or ceaſing, the teſtator recouer his former vnderſtanding: yet dooth not the teſtament made during his former fit, recouer any force or ſtrength thereby [f]. How be it † if theſe madde or lunatike perſons haue cleere or calme intermiſſions, then during the time of ſuch their quietneſſe and freedome of minde, they may make their teſtamentes, appointing executors, and diſpoſing of their goodes at their pleaſures [g]. So that neither the furor going before, nor following the making of the teſtament, doth hinder the ſame teſtament begunne and finiſhed in the meane time [h].

4

f) d. L. furioſum. C. quí teſta. fac. poſſ. d. §. præterea. Inſtit. quib⁹ non eſt permiſſum, &c.

g) d L. furioſum. & d. §. præterea. & DD. ibid.

h) d. Locis.

i) Bar. in L. nec codicillos. C. de codicil. Alciat in tract. de præſump. regula j. præſump. 78.

k) Bar. in d. L. nec codicillos. Minſing. in d. §. præterea. Mantic. de conject. vlt. vol. lib. 2. tit. 5.

l) L. ſi adulterium. §. idē ff. de adul.

m) Vaſ. de ſucceſſ. progreſſ. lib. 1. §. j. vbi contra Socin. & Boer. ſentientes, quod allegans mentis ſanitatem tenetur eandem probare, non dubitat hanc opinionem indignam tantis viris affirmare. Ego verò ſententiæ Vaſquij ſubſcribo, niſi conſtet teſtatorem ante fuiſſe furioſum. vide Maſcar. de probac. concl. 824. n. 10, 11, 12, 13.

5 And here note, that † euery perſon is preſumed to be of perfite minde and memorie, vnleſſe the contrary be prooued [i]. And therefore if any perſon goe about to impugne or ouerthrowe the teſtament by reaſon of inſanitie of minde, or want of memorie, hee muſt prooue that impediment [k]. If it bee asked wherefore then is that vſuall clauſe (of *perfit minde and memorie*) ſo duelie obſerued in euery teſtament, if he that doth preferre the will bee not charged with the proofe thereof? It may be anſwered, that that which is notorious is to be alledged not prooued [l]: And ſo this beeing accompted notorious; (becauſe where the contrarie appeareth not, the lawe preſumeth it) it needs not be prooued [m]: and therefore I ſuppoſe,

poſe, that clauſe to be more vſuall then neceſſarie, and yet not hurtfull [n].

Seing then he whoſe intent is grounded vpon the madneſſe & lunacie muſt prooue the ſame, it ſhall not be amiſſe, to ſet down ſome obſeruations concerning the manner of proofe therof.

Firſt therfore it may be deliuered for a rule, that † it is ſufficient for the partie which pleadeth the inſanitie of the teſtators minde, to prooue that the teſtator was beſides him ſelfe, before the making of the teſtament, although he doo not prooue the teſtators madneſſe, at the very time of the making of the teſtament [o], the reaſon is: It being † prooued that the teſtator was once mad, the lawe preſumeth him to continue ſtill in that caſe, vnleſſe the contrarie be prooued [p]. For like as the lawe preſumeth euery man to be an honeſt man, vnleſſe the contrarie be prooued [q], and beeing prooued, then he which is euill to be euill ſtill: So concerning furor; the lawe preſumeth euery man to haue the vſe of reaſon and vnderſtanding vnleſſe the contrarie be prooued, which being prooued accordingly, then hee is preſumed in law to continue ſtill void of the vſe of reaſon & vnderſtanding [s], vnleſſe the teſtator were beſides him ſelfe but for a ſhort time, and in ſome peculiar actions, and not continually for a long ſpace, as for a moneth or more [t], or vnleſſe the teſtator fell into ſome frenzie vpon ſome accidentall cauſe, which cauſe is afterwardes taken away [v], or vnleſſe it be a long time ſince the teſtator was aſſaulted with the maladie [x], for in theſe

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n) Immo prodeſt huiuſmodi clauſula, quoad probationis adminiculum a Notario ſcripta. Mantic. de coniect. vlt. vol. lib. 2 tit. 5. in fin.

o) Gloſſ. in c. fin. de ſucceſſ. ab inteſtat. extr. Lanfranc. in c. quoniã contra de probac. extr. verb teſtiũ. depoſ. & eſt communis opinio, per præpoſ. in c. dilectus. deſponſ. extr.

p) Mantic. de coniect. vlt. vol. lib. 2. tit. 5. Dec. in L. furioſum. C. Qui teſta. fac. poſ.

q) Alciat. de præſump. reg. 2. præſump. 8.

r) c. ſemel malus. de reg. iur. 6.

s) Panor. Io. And. & Butr. in c. cum dilectus de ſucceſſ. ab inteſtat. ext. quorum op. com. eſſe multis teſtimonijs probat. Maſcard. de prob. verb. furioſum. concl. 825. n. 5.

t) Bar. in L. 2. de bon. poſſ. infan. & furioſ. delat. Mantic. de coniect. vlt. vol. lib. 2. tit. 5. n. 7. verb. ſed tamen.

v) Are. in L. 2. ff. de teſta. Couar. in tract. deſpõſ. & mrion. 2. parte. c. 2. n. 6. Mãtic. vbi ſup. verb. tertio.

x) Bald. & alij. in L. furioſum. C. qui teſta. fac. poſ. Couar. in d. c. 2. n. 6

theſe caſes the teſtator is not preſumed to continue in his former furor or frenſie [y].

8 An other obſeruation is this, † that it is a hard and difficulte point, to prooue a man not to haue the vſe or vnderſtanding of reaſon; and
9 therefore † it is not ſufficient for the witneſſes to depoſe that the teſtator was madde, or beſides his wittes, vnleſſe they render or yeelde a ſnfficient reaſon [z], to proue this their depoſitiõ, as that they did ſee him to doo ſuch things or heard ſpeake ſuch wordes, as a man hauing wit or reaſon, would not haue doone or ſpoken [a]:
10 namely, † they did ſee him throwe ſtones againſt the windowes [b], or did ſee him vſually to ſpit in mens faces [c], or being asked a queſtion they did ſee him hiſſe like a gooſe or barke lyke a dogge [d], or play ſuch other parts as madfolks vſe to doo. This or the like reaſon (whereby the iudge may be induced to eſteeme the teſtator not to be ſound of minde,) ought the witneſſes to yeelde, although they be not interrogated of the cauſe of their knowledge [e]. And
11 ſome † there be which holde this for a ſufficient reaſon in this caſe, if the witneſſes doo ſay, „ I knowe he was mad, for I did ſee him mad, although he doo not expreſſe anie particular act whereby ſuch madneſſe may be collected [f]. Furthermore † this furor or madnes, may be proued by ſinguler witneſſe [g]; ſo that the witneſſes
12 bee not ſingular in time (for if one witneſſe depoſe, of the madnes of the teſtator at one time, and an other witneſſe of his madneſſe at an other time, this dooth not ſufficientlye prooue

y) Paul. de caſtr. in d. L. furioſum. & Maſcard. de probac. verb. furioſus. concl. 825.
z) Bald. in d. L. furioſum. Maſcard. tract. de probac. verb. furioſus. concl. 824. 827.
a) Paul. de caſtr. in d. L. furioſum. Boer. Deciſ. 23. Mantic. de coniect. vlt. vol. lib. 2. tit. 5. & Maſcard. d. concl. 827. Minſing. in §. præterea Inſtit. quibus non eſt permiſſum, &c.
b) Bald. in L. Diuus. ff. de offic. præſid. gloſſ. & DD. in L. ſi cum dotẽ. §. ſin autem. Sol. matr. Adhibe micam ſalis, vt per Mantic. d. tit. 5. n. 12. & per Dec. cõſil. 448 c. Corn. conſil. 22. vol. 4. Mantic. d. tit. 5. n. 12 Maſcard. de probac. concl. 826. n. 29.
d) Maſcard. d. concl. 828. n. 28. Mantic. vbi ſup. & Corne. conſ. 319.
c) Paul. de caſtr. in d. L. furioſum. C. qui teſta. fac. poſſ. Mantic. vbi ſupr. Boer deciſ. 23. n. 4. Maſcard. de probac. concl 827. n. 4.
f) Are. in L. vlt. §. vlt. ff. de verb. ob. Boer. deciſ. 23. n. 44, 45. Mantic. d. tit. 5. lib. 2. n. 16.
g) Gabr. lib. 1. com. concluſ. tit. de teſtibus. cõcl. 2. n. 43. poſt Alex. Tartſ. Dec. & alios ibi nominatos.

that the testator was mad[h]:) But when the witnesses agreeing in time, one deposeth of one madde pranke, an other witnesse of an other madde acte at the same time, these prooue that the testator was then madde, though they doo not both depose of one and the same madde act[i]. If some witnesses doe † depose that the testator was of perfit minde and memorie, and others depose the contrarie, their testimonie is to be preferred, which depose that he was of sound memorie[k], aswell for that their testimonie tendeth to the fauour and validitie of the testament, as for that the same is more agreeable to the disposition of nature[m], for euerie man is a creature reasonable. 13

The laste obseruation is this, if † a Lunatike person, or one that is besides him selfe at some times but not continually, make his testament, and it is not knowne, whether the same were made whiles he was of sound minde and memorie or no: then in case the testament be so conceiued, as thereby no argument of frensy or follie can be gathered, it is to be presumed that the same was made during the time of his calm & cleer intermissions: and so the testament shalbe adiudged for a good testament[n]. Yea † although it can not be prooued, that the testator vseth to haue any cleer & quiet intermissions at al, yet neuertheles I suppose, that if the testamēt be wisely and orderly framed, the same ought to be accepted for a lawfull testament[o]. But if in the testament there be mixture of wisedome and follie, it is to bee presumed that the same 14 15

was.

h) Quod procedit, siue agatur de probatione furoris in specie, siue in genere. vbi tempus est de substantia actus. Ruin. consil. 67. vol. 1. Mascard de probac. concl. 827. n. 9.

i) Mascard. post Ruin. vbi supr.

k) Gabriel. lib. 1. com. concl. tit. de testibus. concl. 4. n. 19. vbi ad hunc finem citat Iaſ. Corne. Socin. Dec. Grauet: Boer. & alios, quibus adde Mascard. d. concl. 827. n. 11.

l) Simo de Prætis. de Inter. vlt. vol. lib. 2. solu. 4. n. 19.

m) Idm. ibid. n. 18.

n) Michael Graſ. Thesaur. com. op. §. testm. q. 21. vbi atteſtatur hāc op. esse com. Vasq. de succeſſ. progreſſ. lib. 1. §. 1. n. 90. Viuius. lib. com. op. verb. testm.

o) Hanc opinionem cōmuniter receptam esse contra Abb. & alios, refert idem Graſ. d. q. 21. n. 4. Idem Boer. q. 23. n. 88. veriorem etiam & magis com. affirmat Ioseph Ludo. de eiſ. 1. n. 13. Qninimo ne ab hac opinione recedas, monet Graſſ. vbi supra.

was made during the teſtators frenſie[p]; in ſo much that if there be but one worde ſounding to follie, it is preſumed that the teſtator was not of ſounde minde and memorie when hee made the ſame. And therefore in this caſe is the teſtament voide[q], vnleſſe that it may bee prooued, that there was intermiſſion of furor the ſame time.

p) Bald. & Angel. in L. furioſum. C. qui teſta. fac. poſſ.

q) Idem Angel. in eadē L. furioſum.

Of Idiots.

1 *What perſon is deemed an Idiote.*
2 *An Idiote can not make a teſtament.*
3 *He that is of a meane capacitie, or indifferent betwixt a wiſe man & a foole, may make a teſtament.*
4 *Although a man be not an Idiote, yet if hee bee ſo very ſimple, that there is but ſmall oddes betwixte him and a naturall foole, ſuch a perſon can not make a teſtament.*
5 *What if an Idiote ſhould make his teſtament wiſelie and reſonably to the ſhewe, whether were that teſtament good or not.*
6 *A pleaſant ieſt of a very foole, which gaue a verie wiſe ſentence.*
7 *An other ieſt of a fooliſh magiſtrate.*
8 *A naturall foole dooth not vnderſtande what hee ſaith, although he ſeeme to ſpeake wiſely.*
9 *A fooles teſtament wiſelye conceiued is ſometimes good in law.*

§. iiij.

1 AN Idiote[a], or a naturall foole is † he, who notwithſtanding he bee of lawfull age, yet he is ſo witleſſe, that hee

a) Idiota apud Ciceronem & alios, indoctū, ſeu illiteratum plerunque ſignificat.

can not number to twentie, nor can tell what age he is of[b], nor knoweth who is his father, or mother, nor is able to anſwer to any ſuch eaſie queſtion. Whereby it may plainelye appeare that he hath not reaſon to diſcerne what is to his profite or dãmage, though it be notorious, nor is apt to be informed or inſtructed by anie other[d]. Such † an Idiote cannot make any teſtament nor may diſpoſe either of his lands[e], or goodes[f]. But † if a man be of a meane vnderſtanding (neither of the wiſe ſorte nor of the fooliſh) but indifferẽt, as it were betwixt a wiſe man & a foole, yea though he rather incline to the fooliſh ſorte, ſo that for his dull capacity he might worthily bee tearmed *Groſſum caput*, a dulpate or a dunſe, ſuch an one is not prohibited to make a teſtament[g]: Vnleſſe he † bee yet moore fooliſh, and ſo very ſimple and ſottiſhe, that he may eaſilie be made to beleeue thinges incredible or impoſſible, as that an aſſe can flie, or that in olde time trees did walke, beaſtes and birdes could ſpeake; as it is in *Æſops* fables: For he that is ſo fooliſh, cannot make a teſtament[h], becauſe he hath not ſo much witte as a childe of tenne or eleuen yeeres olde, who is therefore inteſtable (as the text witneſſeth) namelie for want of iudgement[i].

2

3

4

But what † if an Idiot or natural foole ſhould make his teſtament ſo well and wiſely (in apparaunce,) that the ſame may ſeeme rather to be made by a reaſonable man, then by one voyde of diſcretion, whether is this teſtament good in lawe or no? Surely ſome haue beene of this opinion,

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b) Fitzherbert Na. Bre. de idiota inquirendo.

c) Quid? eſtnè ſtatim fatuus quiſquis non poteſt demonſtrare patrem? Abſit. Nam, vt concedam filium illum meritò ſagacem dici, ſuum qui nouit patrẽ: certè ſi concluderem reliquos omnes eſſe fatuos, vereor, ne excluderem paucos. Notum eſt, quod cecinit de Telemacho, inſignis Homerus: *Ex illo natum mater me dicit: At ipſe Neſcio. Nam certum quis poſſit ſcire parentem?* Quod igitur ſcriptum reliquit Fitzherbert.

§. „ Que tiel perſon „ ſerra dit ſot & ide- „ ote, que ne ſcier „ dire que ſuit ſon „ pere ou mere, &c. ita exaudiendum eſt, ſi neſciat reſpondere, quis appellatur ipſius pater.

d) Fitzherbert. vbi ſup

e) Stat. H. 8. an. 34. c. 5.

f) Sichard. in Rub. qui teſta. fac. poſſ. C. n. 16. Simo. de Præt. de interp. vlt. vol. lib. 2. dub. 1 fol. 4.

g) Simo de Prætis. vbi ſupr. Minſing. in §. præterea. Inſtit. quibus non eſt permiſſ &c.

h) Simo de Prætis de interp. vlt. vol. lib. 2. dub. 1. fol. 4. n. 21.

i) Text. in d §. præterea Inſtit. quibus non eſt permiſſ. teſta. fac.

pinon, that ſuch a teſtament is good and auail-
able in lawe[k], becauſe almightye God dooth
ſometimes ſo illuminate the minds of the foo-
liſh, that for that preſent in that caſe they are not
6 much inferior to the wiſe[l]. And † to this pur-
poſe diuers credible writers doe remember a
mery accident, which (if they ſay truely) was no
fable, but an vndoubted facte[m], and this it is.

At *Paris* one morning a hungrie poore man
begging his almes from doore to doore, did
at the laſt eſpie verye good cheere at a cookes
houſe: whereat by and by his teeth beganne to
water, and the ſpurre of his emptie and egar
ſtomacke pricking him forwardes, hee made as
much haſt towardes the place as his feeble feet
would giue him leaue, where he was no ſooner
come, but the pleaſaunt ſmell partlye of the
meate partlie of the ſauce, did catch ſuch ſure
hold of the poore mans noſe, that (as if he had
been faſt holden with a paire of pinſers) he had
no power to paſſe from thence, vntil he had (to
ſtay the furie of his raging appetite) eaten a
peece of bread, which hee had of charitie got-
ten in an other place. In the eating whereof
his ſence was ſo delighted with the freſh ſmell
of the cookes cates, that albeit he did not laye
his lippes to any morſell thereof: yet in the end
his ſtomacke was ſo well ſatisfied with the one-
ly ſmell thereof, that he plainly acknowledged
himſelfe thereby to haue gotten as good a
breakefaſt, as if he had in deede there eaten his
belly full of the beſt cheere. Which when the
cooke had heard, being an egregious wrangler

k) Ita fuiſſe deciſum in Senatu Romano commemorant Io. And. & And. Barba, cum alijs, in c. ad nram de conſuetud. extr.

l) Gloſſ. in d. c. nram.

m) Io And. Panor. Barba. & alij. in d. c. ad nram. Hyero. Franc. in L. furioſi. de reg. iur. ff. Boer. deciſ. 23. n. 18. Mantic. de coniect. vlt. vol. lib. 2. tit. 5. n. 8.

" and an impudent companion, what dooth hee
" but all haſtily ſteppes foorth to the poore fel-
" lowe, laies faſt hand vpon him, and in a whote
" cholericke moode, bids him pay for his breake-
" faſt. The honeſt poore man halfe amazed at
" this ſtraung demaunde, wiſt not well what to
" ſay: but the cooke was ſo much the more fierce
" and earneſt, by howe much hee perceiued the
" good man to be abaſhed at his boldneſſe, and
" did ſo cunningly cloke the matter, that in the
" ende the poore man was contented to referre
" the deciding of the controuerſie to whatſoeuer
" perſon ſhould next paſſe by that way, & with-
" out any more adoe to abide his iudgement.
" Which thing was no ſooner concluded, but by
" and by commeth vnto the place, a very natural
" foole and ſuch an notorious idiote, as in all
" *Paris* his like was not to be found. All the bet-
" ter for me thought the cooke, for more hee
" doubted the ſentence of a wiſe man then of a
" foole. Well ſir, to this foreſaid iudge they re-
" hearſed the whole fact, the cooke cruelly com-
" plaining, and the other patiently confeſſing as
" before. A great multitude of people were ga-
" thered about them, no leſſe deſirous to knowe
" what would followe, then wonderinge at
" that which had gone before. To conclude,
" this naturall perceiuing what monie the
" cooke exacted, cauſed the poore man to put ſo
" much mony betwixt two baſons, and to ſhake
" it vp and downe in the cookes hearing, which
" doone, he did arbitrate and awarde, that as the
" poore man was ſatisfied with the onely ſmell

of

of the cookes meate, ſo the cooke ſhould bee recompenſed with the only noiſe of the poore mans monye. Which iudgement was ſo commended, that who ſo heard the ſame, thought, if *Cato* or *Salomon* had beene there to decide the controuerſie, they could not haue giuen a more indifferent or iuſt ſentence.

7 The like † caſe is reported to haue happened at *Bononia*[n]. There a certaine couetous man loſte his purſe, with 21. ducates in it, which when hee coulde not recouer with diligente ſearch, he fared like a madde man, and in the ende was readye to haue hanged himſelfe for ſorrowe. An other honeſt man hauing founde ſuch a purſe, mooued with compaſſion came and deliuered the ſame to this couetous perſon, who neuer thanking the bringer, fell forthwith to telling of the monie, and finding but 20. ducates therein, with great greedineſſe he exacted the odde ducate: which becauſe the finder denied, he is brought before the magiſtrate, a man of very great wealth, but of very little wit (but ſuch magiſtrates are many times elected, where the matter lieth in the mouthes of the multitude.) The one partie ſweareth, that there were 21. ducats in the purſe which he loſt. The other partie ſweareth, that there were but 20. ducates in the purſe which hee found. The magiſtrate although a foole, giueth no fooliſh ſentence, for hee pronounced that the purſe which was found, was not that purſe which was loſt, and therfore condemned the couetous perſon to reſtore the 20. ducates

n) And. Barl. a. in d.c. ad nſam. de conſuetud. extr. n. 8.

to

to the other partie.

By these reasons and examples, therefore it may be reasonablie inferred, that if a foole doe make a wise and reasonable testament, the same ought to be allowed as lawfull.

Neuertheless this is the truer opinion, that such a testament is not good in lawe [o], the reason is, because a testament is an act to be performed with discretion and iudgement [p]. But † a naturall foole by the generall presumption of lawe, dooth not vnderstand what he speaketh, though hee seeme to speake reasonably [q], no more then did *Balams* asse [r], when hee reasoned with his maister, or dooth a Parret speaking to the passengers. And although almightye God do sometimes so illuminate the minds of verie naturall fooles and idiotes, that they doe well perceiue, and vnderstand what they speake: yet because this thinge happeneth but verye seldome, the lawe dooth not presume the same by occasion of wordes onely [s]. And therefore vnlesse further proofe bee made thereof, by other circumstances, the lawe dooth not approoue such testamentes. 8

In deede if it † may appeare by sufficient coniectures, that they had the vse of reason or vnderstanding at such time, as they did make their testamentes, then dooth the former opinion take place, that such testamentes are good in lawe [t]. 9

o) Ias. & Dec. in L. furiosi. C. qui testa. fac. poss.

p) Supr. prim. part. §. 3. verb. Senten.

q) Dec. in d. L. furiosum. C. qui testa. fac. poss. lim. 3.

r) Num. c. 22. vers. 28. 2. Pe. c. 2. versic. 10.

s) Dec in d. L. furiosi. & in L. in negotijs de reg. iur. f.

t) Dec. in d. L. In negotijs, & in Hiero. Franc. in d. L. furiosi. de reg. iur. ff.

Of olde men.

1 *Age alone dooth neuer depriue a man of the power*

of

of making a Teſtament.

2 *He that by extreame olde age is become a childe in his vnderſtanding, cannot make a Teſtament.*

3 *He that hath loſt his memorie, cannot make a Teſtament.*

§. v.

1 ALbeit † olde age alone doeth not depriue a man of authoritie and power of making a teſtament[a], (for a man may freely make his Teſtament how olde ſoeuer he be, for it is not the integritie of the bodie, but of the 2 minde, that is requiſite in teſtaments[b]:) yet † if a man in his olde age, do become a very childe againe in his vnderſtanding[c], which thing doeth happen to diuers perſons, being, as it were, worne away with extreame age, and depriued, not onely of the vſe of reaſon, but of ſence alſo almoſt: ſuch a perſon can no more make a teſtament, then a childe[d].

a) L. ſenium. C. qui teſta. fac. poſſ.

b) d. L. ſenium.

c) Simo de Prætis. de inter. vlt. vol. lib. 2. dub. 1. ſoluc. 4. n. 22.

d) Ibidem.

3 So it is, † if a man, either by reaſon of age, or ſome other infirmitie, become ſo forgetful, that he hath forgottē his own name[e], (which thing alſo hath happened to diuers wiſe and learned men,) becauſe for any acte which is to bee performed with diſcretion, he is no more fit then a foole or an idiote[f], of whom we haue ſpoken already.

e) L. fin. C. de hæred. Inſt.

f) Bald. in d. L. fin. Mantic. de coniect. vlt. vol. lib. 2. tit. 15. n. 16.

Of him that is drunke.

1 *Whether he that is drunke may make a teſtament.*

§. vj.

§. vj.

HEe † that is ouercome with drinke during the time of his drunkennesse, is compared to a madde man, and therefore if hee make his testament at that time, it is voide in lawe [a]: which is to bee vnderstood when hee is so excesiuely drunke, that he is vtterly depriued of the vse of reason and vnderstanding. Otherwise, if hee bee not cleane spent, albeit his vnderstanding be obscured and his memorie troubled, yet may he make his testament being in that case [b].

a) Vasq. de succeſſ. crea. lib. 2. §. 13. requiſ. 7. n. 8 Simo de Pretis. de inter. vlt. vol. lib. 2. dub. 1. ſoluc. 4. n. 22.

b) Idem. Vasq & Simo de Prætis. vbi ſupra.

Of ſlaues and villeines.

1 *Of all men the ſlaue is in greateſt ſubiection.*
2 *What is a ſlaue.*
3 *A ſlaue hath neither landes nor goods, for both are his lordes.*
4 *Whether the children of bonde parentes, be ſubiect to ſeruitude.*
5 *By the ciuill lawe the childe is free, if the mother be free, notwithſtanding the bondage of the father.*
6 *By the lawes of this realme the childe is freeborne whoſe father is free, though the mother be a bonde woman.*
7 *No baſtard is borne a ſlaue, though the father bee a bond-man.*
8 *A bond-man cannot make a teſtament.*
9 *Of the difference betwixt a bond-ſlaue and a villeine.*

10 *A villeine, like vnto him which is called in the ciuill lawe* Aſcriptitius Glebæ.
11 *Whether a villeine may make a teſtament.*
12 *The Lord may take from his villeine, whatſoeuer he hath, life excepted.*
13 *The teſtament of the villeine is not voide, but voidable.*
14 *Sometimes the Lord can not make voide the teſtament of his villeine.*
15 *The Prince may at any time make voide the alienation or gifte of his villeine, and conſequentlie his teſtament.*
16 *What manner villeines be here ment?*
17 *A villeine executor may make a teſtament.*
18 *A villeine executor may maintain action againſt his Lord.*
19 *The reaſon of the former concluſion.*

§.vij.

1 OF all † men which be deſtitute of libertie or freedome, the ſlaue is in greateſt ſubiectiõ, for a † ſlaue is that perſon which is in ſeruitude or bondage to an other, euen againſt nature[a]. Neither
2 † hath he any thing of his owne, but whatſoeuer he poſſeſſeth, all is his Lordes[b]: Not onely landes, goodes, and cattelles, and generallie whatſoeuer he getteth, either by his owne induſtrie, or by the gifte of other, or by any other
3 meanes[c]: But † euen his children alſo are in-

a) §. Seruitus. Inſtit. de iure perſonarũ. Et dicitur latinè ſeruus, non à ſeruiendo, ſed à ſeruãdo: propterea quòd ſeruandi non oriẽdi ſunt à dominis. Nam cùm antiquitùs multi ſęuijſſent in captiuos, eóſq; necaſſent, prohibitum id fuit, conſtitutúmq; vt potiùs venderentur, quàm occiderentur. Et inde à ſeruando, nomẽ mutuarunt ſerui.

§. ſerui autem. Inſtit. de iure perſonarum. (b) §. in poteſtate. Inſtit. de his qui ſui vel alie. iur. (c) §. iterum. Inſtit. per quas perſonas.

fected

fected with the Leproſie of his fathers bondage[d].

And although by † the ciuill lawe the wife 5
being a free woman, the children are likewiſe free, *Quia partus ſequitur ventrem*[e]; in ſo much that if the mother be free, either at the conception or at the birth of the child, or in the meane time by the ſame ciuill lawe, that child ſhall be free, notwithſtandinge the bondage of the father[f]: Yet it † is otherwiſe by the lawes of the 6
realme, for the childe dooth follow the ſtate & condition of the father, and therefore in England the father being a bondman, the child ſhal be in bondage, without diſtinction whether the mother be bond or free[g]: So that the childe be begotten or borne in lawfull matrimonye.
But † a baſtarde ſhall not be bound though the 7
father were a bond-ſlaue[h], becauſe the lawe dooth not acknowledge any father in this caſe, for by the lawe a baſtard is ſometimes called, *filius nullius*, the ſonne of no man: ſometimes *filius vulgi*, the ſonne of euery man[i]. But howſoeuer the ciuill lawe and the laws of this realme differ in this, whether the bondage of the father or of the mother, doo make the childe bonde: Yet in † this they doo agree, that a 8
bond-man can not make a teſtament[k].

A villeine † howſoeuer he may ſeeme like vn- 9
to a ſlaue, yet his bondage is not ſo great, for whatſoeuer a bond-ſlaue getteth, by and by it is his Lords; albeit ignoraunt and vnwillinge[l], not onely in reſpect of property, but alſo in reſpect of poſſeſſion: for whatſoeuer a bond-

ſlaue

d) Bracton. de legib. & conſu. Ang. lib. 1. c. 6. principall grounds. fol. 44.

e) §. ſed etſi. Inſtit. de ingenuis.

f) Eod. § ſed etſi.

g) Bracton. de legib. & conſ. Ang. lib. 1. c. 6.

h) Bracton. vbi ſupr. principall grounds. fol. 44.

i) Cui pater eſt populꝰ, pater eſt ſibi nullus, & omnis. Cui pater eſt populus, non habet ipſe patrem. gloſſ. in §. pen. Inſt. de nuptijs.

k) L. liber. de petic. hæred. L. ſeruus. Comm. de ſucceſſ. C. Vaſq. de ſucceſſ. progreſſ. lib. 1. §. 1. vbi multis amplᵗ hanc propoſitionem ornat.

l) §. Item nobis Inſtit. per quas perſonas.

ſlaue dooth poſſeſſe, he doth alſo poſſeſſe it for his Lord[m]. But it is not ſo with a villeine, for the Lord hath no title to the goodes of his villeine before ſeaſin; nor any title to his landes before entrie, nor anie title to any rent, reuerſion, common, or the aduowſement of a church, belonging to the villeine, but by clame[n]. And ſo the velleine in the meane time hath perfecte
10 propertie therein[o]. And therefore † a villeine is more like vnto him, which in the ciuill lawe is called *Aſcriptitius Glebæ*[p], (that is to ſay, one that is aſcribed or aſſigned to a ground or farme, for the perpetuall tilling or manuring thereof[q],) then to a ſlaue.

11 If you will † vnderſtand whether a villeine,
12 may make his teſtament or not: we muſt † note that whatſoeuer villeines haue of their owne, be it landes or goodes, the lorde may by entrie or ſeaſing take and enioye the ſame as his owne[r], onely he may not ſlay or maine his vil-
13 leine[s]. And therefore † if the villeine make any deuiſe of landes or goodes, the Lord may before the approbation of the will, or apprehenſion of the goodes, by the executor, enter to thoſe landes and ſeaſe thoſe goodes or ſome parcell thereof, in the name of the whole, and by that meanes make voide the gifte or deuiſe of the villeine[t]. The will is alſo voyd, though the Lord doe not really ſeaſe any goods of his villeine, in caſe he did claime the villeine in his life time, and by wordes onely did ſeaſe his goodes, for then the executor ſhall not haue them but the lord of the villeine[v].

But

m) Eod. §. Item ibi, non ſolum.

n) Perkin. tit. Grant. fol. 6. Brooke Abridg. tit. villenage. Doct. & Stud. lib. 2. c. 43.

o) Doct. & Stud. d. c. 43. lib. 2.

p) Aſcriptitius Glebæ, id eſt, adſcriptus prædio. Spieg. Lexicon.

q) Quemadmodum enim Aſcriptiti[9] verè ſeruus non eſt, ſed ſeruili tantùm macula aſperſus. Bald. in L. cũ precum. C. de lib. cauſa' & ſicut. qui aſcribitur glebæ, ſeu prædio perpetuò colendo, nunquam inde recedere debet: vel ſi aufugiat ad antiquos penates, nempe vbi natus eſt, redire cõpellitur. L. omnes de Agricul. cenſit. lib. 11. C. Eodem prorſus modo iſti, quos *Villeins* appellat vulgus. Licet non ſunt propriè ſeruĩ; perpetuæ tamen prædij culturæ aſtringuntur nunquam inde receſſuri inuito vel ignorãte domino. Quod ſi aufugiunt, conceditur ſtatim breue, quod dicitur De natiuo habendo. Fitzh. Nat. Bre.

r) Brooke Abridg. tit. villenage. Perkins. tit. Graunts. fol. 6. Litleton tit. villenage. Termes of law. verb. Them.

s) Old tenur. tit. villen.

t) Doct. & Stud. lib. 2. c. 43.

v) Brooke. tit. villeine. n. 50.

But if † the will be prooued before the ordi- 14
narie, and by him approoued; and the executors (by vertue of the same will or deuise) enioie or possesse the same landes or goodes, accordingly, then I suppose the lord may not enter, to such landes or sease those goodes, no entrie, seasing or claime being made before[x]: for if a villeine purchase landes and alieneth the same to an other, before his lorde enter; then the lord may not enter afterwardes, but it shall be imputed to his owne follie, that hee entred not when the lands was in the villeines hands[y]. And so it is of other goodes, which if the villeine sell or giue to an other before the Lorde doe sease the m, the sale or gift is good, and the lord can not afterwardes haue the same[z].

x) Brooke eodem titu. num. 73. Doct. & Stud. lib. 2. c. 43. Adde quod Ascriptitius potest testm facere. Spec. de Instr. edi. §. compēdiose. Lindw. in c. statutū. verb. Ascriptitiorū. de testa. lib. 3. prouincial. constit. Cant.

y) Litleton. tit. villenage.

z) Ibidem.

Neuertheless if the † prince haue anie vil- 15
leine, which purchaseth lands, and alieneth the same before the prince doo enter, yet maie the prince at any time after enter vnto the landes to whom so euer the same doe come[a]. And likewise, if the princes villeine sell or giue any goodes, yet may the prince at any time after sease those goods in whose hands so euer they doo remaine[b], for the prince is not preiudized by any course of time. And therefore I doe collect, that if the princes villeine should by testament dispose either landes or goodes, the prince (notwithstanding the approbation of the same testament, and execution thereof) might enter to the lands and sease the goods so deuised, or disposed, in whose hands so euer the same were[c].

a) Litleton. vbi supr.

b) Ibidem.

c) Arg. à contract. ad vlt. vol. de quo Olden. Topic. Legal. loco à contract.

Note

16 Note that † what I haue here ſpoken of villeines, is not to be vnderſtood of ſuch perſons as onely holde lands in villenage, being themſelues no bond-men but free (for diuers perſons holde by tenure in villenage, and yet be no villeines themſelues [d]) but of ſuch as bothe hold by villenage and are villeines alſo: For theſe are they whoſe teſtaments or laſt willes are voidable, ſauing as before, where the will is prooued and the executor or legatary poſſeſſed of the thinges deuiſed: And ſauing where

17 † the villeine is executor to an other perſon, for being executor himſelfe he may appoint an other executor, who ſhall haue thoſe goodes which the villeine had as executor, and not

18 the Lord of the villeine [e]. For if the † villeine himſelfe were liuing the Lord could not take from him ſuch goodes, as hee hath as executor to an other man, & if he did, his villeine might bring an action againſt him for the ſame, and recouer both the goods and dammages [f]: the

19 † reaſon is, becauſe that which the villeine hath as executor, hee hath it not to his owne vſe [g], but is to be imployed in the behalfe of the teſtator, as to the paiment of his debtes and legacies, and to other godlye vſes: as appeareth more at large in the office of an Executor [h].

d) Brooke, Littleton, Old. tenures, tit. villenage.

e) Brooke tit. villenage. n. 73.

f) Brooke. d. tit. villenage. n. 68.

g) c. Statutum. § nullus de teſta. lib. 3. prouincial. conſtituc. Cant. & infr. part. 6. § j.

h) Infr. 6. part. §. j. §. iij. §. xvj. §. xxj.

Of captiues and priſoners.

1 *A captiue during his captiuitie, can not make a teſtament.*

2 *If the captiue eſcape, whether the teſtament made during his captiuitie be good?*

3 *What if the teſtament were made before hee were captiue.*

4 *What if the teſtator be taken captiue, by ſome pirat, Turke, Infidle or chriſtian, when warre is not proclamed.*

5 *Whether he may make a teſtament which is condemned to perpetuall priſon.*

6 *VVhat if the teſtator be impriſoned for dette.*

§. viij.

HEe † that is taken captiue by the enemie, during his captiuitie, can not make a teſtament[a]: In ſo much that † if afterwardes hee doo eſcape, yet the teſtament made whiles he was with the enemie, is voyd[b]. But if † his teſtament were made before his captiuitie; then after his eſcape, the teſtament is of like force, as if he had not beene captiue[c]. Likewiſe if the teſtament were made before he were apprehended, and the teſtator die in captiuitie, yet is the teſtament allowed, and the executor by force therof, is to haue all his goodes here within this realme of England, as if he had died the day before his captiuitie[d]. Likewiſe † if any perſon be taken as captiue by any Piratte, Turke, Infidell or Chriſtian, where warre is not proclamed, hee that is ſo taken remaineth ſtill a free man: and therefore if hee make his teſtament whiles he is ſo deteined, the teſtament is good and

1 2 3 4

a) L. eius qui apud hoſtes. ff. de teſta.

b) Ead. L. eius.

c) L. ratio ff. de captiuis. Graſſ. Theſaur. cõ. op. §. teſtm̃ q. 25. vbi hãc opinionem communiter approbatam oſtendit.

d) L. lege Cornelia. ff. de teſta.

6 and lawfull [c]. If a † lay man be condemned to perpetuall priſon for ſome offence, it ſeemeth
7 that he can not make a teſtament [f]: but if † any perſon be impriſoned for dette, ſuch impriſonment being ordained for ſafety not for puniſhment, he is not thereby diſabled to make his teſtament [g]; ſauing that the teſtamēt is not good, when it is made in his fauour, at whoſe ſuite the teſtator is impriſoned, of intent to extorte the ſame [h].

c) L. qui à latronibus. ff. de reſta.
f) Panor. in Rub. de teſtim. extr. Graſſ. Theſaur. com. op. §. teſtim. q. 28. cui tamē opinioni quantumuis communi non acquieſcit Clar. §. teſtim. q. 23.
g) Bald. in L. 1. C. ſi quis aliq. teſtari prohib. n. 5.
h) L. qui carcerem. ff. quod me cauſ. Mantic. de coniect. vlt. vol. lib. 2. tit. 7. n. 2.

Of a vvoman couert.

1 *A maried woman cannot make her teſtament of lands.*
2 *Eſpecially not to her husband, and wherefore.*
3 *What if ſhe be not conſtrained, but doeth deuiſe the ſame freely of her owne accord.*
4 *What if the teſtament be made before mariage.*
5 *What if the teſtament being made during mariage, ſhe ouer liue her husband.*
6 *Certain caſes wherin the deuiſe of lands is good, not withſtanding the couerture of the teſtatrix.*
7 *A wife cannot make her teſtament of goods, without her husbands licence or conſent.*
8 *The reaſon wherefore the wife cannot make her teſtament of goods, without the husbands licence or conſent.*
9 *Whether it be neceſſarie that this licence or conſent ſhould goe before the making of the will, or concur, or may follow.*
10 *Whether, and when the husband may reuoke the*

licence giuen to his wife.

11 *Certaine cases wherein the wife may make her testament without her husbandes consent.*

12 *Whether an Empereſſe or a Queene may make a testament without the consent of the King or Emperour.*

13 *Of that which is due to the wife, whereof the husband was neuer possessed, she may make her testament without his consent.*

14 *A woman contracted in matrimony, if the mariage be not solemnized, may make her testament.*

15 *A wife being executrix, may make an executor to the former testator without her husbands consent.*

16 *The reason of the former position.*

17 *Whether a wife being executrix, may make her husband executor in her place.*

18 *A wife executrix may not giue away the testators goods by her will.*

19 *A wife both executrix and legatarie, cannot make a testament of that which she did accept not as executrix, but as legatarie.*

20 *The reason wherefore an executor can not dispose the testators goods by legacies.*

21 *The reason wherefore a wife executrix and legatarie, may not make her testament of that which she did accept as legatarie.*

22 *Whether shall the wife which is bothe executrix, and legatarie, bee deemed to haue accepted of the testators goods as executrix or legatarie?*

23 *Whether the wife being licenced to make her testament may make any moe willes but one.*

§. ix.

1 Maried † woman by the lawes and ſtatutes of this realme, can not make her teſtament of any mãnors, lands, tenementes or hereditaments [a]. This concluſion is diuerſly enlarged: And firſt ſhee 2 † cannot deuiſe the ſame to her husband [b]: the equitie of which prohibition, (If I may be ſo bolde with the good fauour of our temporall lawyers, to inſert the reaſon & conſideration of the ciuill lawe) is not obſcure. For if this gappe were lefte open, fewe children ſhould ſucceede in the mothers inheritaunce [c]. But by howe much the husband were more cruel, & the wife more timerous, he crafty, ſhe credulous, by ſo much the more were the lawfull heire in dãger to be diſherited, and the cruel & deceitfull huſband in hope to be vnworthilye enriched and aduaunced. Wherefore if the wife ſhould deuiſe any her mannors, lands, tenements, or hereditaments or any part therof to her husband, this deuiſe were voide, becauſe the ſame is preſumed to haue beene made by conſtrainte of the husband, or other ſiniſter meanes [d]. Secõdly, albeit † it did appeare by due proofe, that 4 the husband did not conſtraine his wife therevnto; but that ſhe of her owne accorde or free motion did make any ſuch deuiſe either to her husband, or to any other perſon by his conſent: yet is not the deuiſe good [e], as well becauſe the words of the ſtatute are generall (and

a) Stat. H. 8. an. 34 c. 5.

b) Brooke Abridg. tit. deuiſe. n. 32. 34.

c) L. 1. 2. 3. ff de donat. inter vir. & vx.

d) Brooke. vbi ſupra.

e) Ita ſæpius accepi à nonnullis huius regni iuriſperitis, non vulgaribus, quos ipſe velim conſulas.

where the lawe dooth not diſtinguiſh, there may not we diſtinguiſh [f],) as for diuers other reaſons grounded in the common laws of this realme. Thirdly, albeit † the teſtament be made before the mariage, yet ſhe being inteſtable at the time of her death, by reaſon her husband is thē liuing, the teſtamēt is voyd [g]: for it is neceſſarie to the validity of a teſtament, that the teſtator haue ability to make a teſtament, not onelie at the time of the making thereof, when the teſtament receiueth his eſſence or being: but alſo at the time of the teſtators death, when the teſtament receiueth his ſtrength and confirmation [h]. Fourthly, albeit † the wife doo ouerliue the husband, yet the teſtament made duringe the mariage is not good: the reaſon is yeelded before, becauſe ſhe was inteſtable at the time of the will making [k]. But if † the teſtament beeing made during the couerture, ſhe doo approoue and confirme the ſame after the death of her husband, in this caſe the deuiſe is good, by reaſon of her new conſent, or new declaration of her will [l]. What if the teſtament be made before the mariage, and ſhee ouer liue her huſband, whether in this caſe is the teſtamēt good or not? By the ciuil law it is of as great force, as if ſhe had not beene maried at all [m]: and ſo I am informed that it is by the lawes of this realme [n]. Neuertheleſſe I ſhall willingly referre thee to the learned profeſſors thereof. This much of the deuiſe of lands.

4 5 6

Of † goods and cattelles the wife can not make her teſtament, without the licence or con-

f) L. peccio. ff. de public. in rem. action.

g) Arg. § alio. Inſtitu. quib. mod. teſta. infir.

h) d. §. alio. & §. non tamen. Inſtit. quib. mod. teſta. infir. L. 1. §. exigit. ff. de bon. poſſ. ſecundū tab. Porc⁹ in §. in extraneis. Inſtit. de hæred. qual. & dīa.

i) c. Non firmatur de reg. iur. 6. L. 1. § j. de leg. 3.

k) Arg. §. præterea. Inſtit. quib. non eſt permiſſ. teſta. fac. verb. nec ad rem. Plowd. in caſ inter Bret. & Rigden. fol. 343.

l) L. 1. §. j. de leg. 3. ff. & ibi Paul. de caſtr. & alij.

m) d. §. non tamen & §. pen. verb. deniq;. Inſtit. de mil. teſta.

n) Plowd. d. caſ. inter Bret & Rigden. fol 343

conſent of her husband[o], (except in certaine
8 caſes hereafter ſpecified[p]) becauſe † by the laws and cuſtomes of this realme, ſo ſoone as a man and a woman be married, al the goods and cattels perſonal that the wife had at the time of the ſpouſals, or celebration of the mariage, or after[r], and alſo the cattelles reall, if he ouer liue his wife; belong to the husband, by reaſon of the ſaid mariage[s]: and therfore with good reaſon ſhe can not giue that away which was hers without the ſufferance or graunt of the owner[t]:
6 Notwithſtanding † vpō licence or cōſent of the husband the wife may make her teſtament, euen of his goods[v]. And albeit the nature of a licence is to goe before the acte[x], and the propertie of auctoritie, or auctorizable conſent is to concurre with the acte[y]: yet by the lawes of this realme, if a wife make a teſtament of her husbands goods, the husband not vnderſtanding thereof, and after her death the executors proue the ſame, if the husband deliuer the goods deuiſed in the will to the executor, therby he hath made the teſtament good, notwithſtanding hee were not priuie to the making thereof[z]; becauſe in this caſe the ſame law preſumeth, that the husband gaue his cōſent in the beginning, at the time of the will making. And therfore the ſame being proued and the goods deliuered accordingly, it is thē too late for him
10 to reuoke the ſame[a]. Albeit otherwiſe, if † the husband doo giue licence to his wife, to make a wil of his goods, yet he may reuoke the ſame, not onely at the making of the wil, but after her

o) Bracton de legib. & conſue. Ang. lib. 2. c. 26. Brooke. tit. deuiſe. n. 34 & in tit. teſtamēt. n. 21. Lindw. in c. ſtat. verb. propriorum de teſta. lib. 3. prouincial. conſtituc. Cant. cui tamen hoc durum videtur.

p) Hoc ipſo. §. n. 11. cum ſequen.

r) Tract. de repub. Ang. lib. 3. c. 6. Doct. & Stud. lib. 1. c. 7.

s) Doct. & Stu. lib. 1. c. 7

t) L. id quod noſtrum. de reg. iur. ff. c. filius de teſta. extr.

v) Lindw. in d. c. ſtatutū verb. propriorum. de teſta. lib. 3. prouincial. conſtituc. Cant. Bract. d. lib. 2. c. 26. Brook. tit. deuiſe n. 34.

x) Phil. Franc. in c. Ratishibitio. de reg. iur. 6.

y) Tiraquel. de legib. Conub. gloſſ. 4. in prin.

z) Perkin. tit. deuiſe. c. 8. fol. 97. Tiraquel. vbi ſupr.

a) Perkin. vbi ſupr.

death, at the least before the will be proued[b].

The † cases wherein a wife may make a te- 11
ſtament of goodes and cattelles, without her
husbands licence and conſent are theſe. Firſt I
ſuppoſe that an Empereſſe † or a Queene maie 12
make her teſtament without the licence of the
Emperor or King her husband, ſo that it be not
in preiudice of her ſaid husband[c]. The ſecond
caſe is when any thinge is † due vnto the wife, 13
wherof ſhe was not poſſeſſed during the mari-
age: For it ſeemeth that ſhe may make her teſta-
ment thereof, and that ſhe may make her huſ-
band executor in that caſe[d]. Thirdly, if † a man
and a woman be contracted together in ma- 14
trimonie, and the woman die before eſpouſals
or celebration of the mariage, albeit the lawe
dooth often call this woman thus betrothed
and aſſured by the name of wife, becauſe of the
certaine hope of mariage, ſhortly to be ſolem-
nized, whereby ſhe ſhall become a wife[e]: yet I
take it for a cleare caſe, that the woman ſo dying
may make her teſtament without his agree-
ment, to whom ſhe was contracted in matri-
monie[f]. Fourthlie † if the wife bee executrix 15
to an other man, ſhe may make her teſtament
without the licence of her husband[g]: the rea-
ſon † is becauſe ſuch goods as ſhe hath as exe- 16
cutrix, are not her husbands, but are to be diſtri-
buted for the deade, as for the paiment of his
dettes, performance of his wil, & for ſuch other
good and godlye purpoſes[h]: and therefore if
the executrix ſhould make no executor but die
inteſtate, adminiſtration might be obteined of
the

b) Brook. Abridg. tit. deuiſe. n. 34.

c) De Auguſta, & Regina, an & quãdo exẽptæ ſint à legibus, vel ſtatutis, quibus cauetur, ne vxor teſtamentum condere valeat ſine mariti conſenſu, videre eſt apud Peckium, in præclaro ſuo tractatu de teſtam. coniug. lib. 3. c. 26.

d) Brook. Abridg. tit. teſtam. n. 11. Fitzherb. Abridg tit. executor. n. 109.

e) Couar. de ſponſal. 2. part. c. 1 n. 4. Peckius. de teſta. coniug. lib. 4. c. 5.

f) Perkins tit. feoffm. ẽt. c. 3. fol. 40. quod verum eſt iure huius regni. Cæterum attenta legiſtarum opinione cõmuni, ſi ſtatuto caueatur, ne quid coniuges inuicem relinquere poſſint: intelligitur etiam de ſponſis. Peckius. tract de teſta. coniug. lib. 4. c. 11.

g) Fitzherb. Abridg. tit. exec. n. 40. Brook. eod. tit n. 11. Perkins. tit. de uſe. c. 8. fol. 97.

h) Latus inf. par. 6. §. 3.

the goods not adminiſtred by the next of kinne of the teſtator deceaſed[i], (for where an executor dieth inteſtate, the teſtator from that tyme is eſteemed to die inteſtate[k],) ſo farre is it from the husband to haue any of thoſe goods whereof his wife is executrix; much like vnto that lord whoſe villeine is executor, in which caſe he can not take from his villeine that which did belong to the teſtator, but his villeine may haue an action againſt him for the ſame and may recouer bothe the goodes and dammages, (as hath beene ſaid before.[l]) Although otherwiſe whatſoeuer dooth appertaine to the villeine, the lord may take the ſame from him, and (as our common lawyers tearme it) maie
17 euen robbe his villeine[m]. Furthermore † it is not onely lawfull for the wife being executrix to make a teſtament without her husbands licence, but ſhe may name and appoint him exe-
18 cutor[n]. Howbeit this poſitiō †, that the wife being executrix, may make her wil of thoſe goods wherof ſhe is executrix, without her husbands licēce is reſtrained in two caſes: the one is whē ſhee dooth not make an executor, but bequeatheth the goods whereof ſhe is executrix,
19 by deuiſe or legacie[o]. The other is, when † ſhe is not onely executrix, but legatary alſo, and hath accepted of the thing bequethed, not as executrix but as legatary[p]. In theſe two caſes the will
20 is void, the † reaſon of the former of theſe two limitations is, becauſe an executor may not diſpoſe of the goods of the teſtator, otherwiſe then to the vſe of the teſtator, as to the paiment

i) Plowden in caſ. inter Greisbrook & Fox.
k) Brook Abridg. tit. adminiſtrator. n. 45.
l) Supr. ead. part. §. viij. n. 18.
m) Olde tenures. tit. villenage.
n) Brook Abridg. tit. exec. n. 11.
o) Plowd. in caſ. inter Bransby & Grantham. fol. 525 imo nec cum conſenſu mariti, poteſt legare teſtatoris bona.
p) Infr. hoc ipſo. §. n. 21.

of his dettes performaunce of his will, and to other charitable vſes[q] : and therefore may not giue or deuiſe the ſame by legacie, for that were to diſpoſe of the teſtators goods, as if they were the proper goods of the executor, and to conuert the ſame to the priuate vſe of the legatary[r], and not to the vſe of the teſtator. But when an executor dooth onely make an other executor, the ſecond executor dooth ſtand chargeable and accomptable for the diſtribution of the firſt teſtators goods to the vſe of the ſame teſtator, as did the former executor, and is by the lawes of this realme reputed for the executor, not of the executor, but of the former teſtator[s]; ſo is not a legatarie. The reaſon† of the ſecond limitation is this, for that which one hath as legatarie, hee hath it to his owne priuate vſe[t], and not to the vſe of the teſtator : and the wife being not onely executrix, but legatarie alſo; accepting of the thing bequeathed, not as executrix, but as legatarie; doth thereby make it her owne proper goods, & conſequently her husbandes: For that which is the wiues, is by reaſon of the mariage her husbandes, and being inueſted in him[v], (as hath beene ſaide before:) cannot bee giuen from him without his licence or conſent[x]. Great difference there is therfore betwixt theſe two caſes, of accepting the thing bequethed as executrix, or as a legatarie, for in the one caſe it is not her husbands, and ſo ſhe may make a teſtament therof, by appointing an executor to diſtribut the ſame to the vſe of the firſt teſtator[y]: and in the other caſe

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q) c. ſtatutum. lib. 3. prouincial. conſtitue. Cant. Plowd. d. caſ. inter Bransby. & Grantham. & infr. 6. part. §. j. & §. iij.

r) Plowden. vbi ſupr. facit. c. filius. de teſta. ext.

s) Brook Abridg. tit. execut. n. 132. & infr. par. 6. §. j. & §. iij tu vide Bar. in L. veluti. ff. de petic. her.

t) L. legatum. de leg. 2. L. à Titio de furtis. ff.

v) Tract. de repub. Ang. lib. 3. c. 6.

x) L. id quod noſtrum. de reg. iur. ff.

y) Brook. tit. exec. n. 1[illegible].

caſe it is her husbands; and ſo ſhe can not make any teſtament of the ſame without his licence[z].

z) Supr. eod. §.

22 But † here ariſeth an other queſtion, what if it doo not appeare whether the wife did accept the thing bequeathed, as executrix or legatary: In whether name is ſhee preſumed in lawe to haue accepted the ſame? as executrix? or as legatarie? Some are of this opinion, that ſhe is eſteemed to haue accepted the ſame as executrix, not as legatarie[f], becauſe it is not lawfull for legataries to caruefor thēſelues, taking their legacies at their own pleaſures[g]; but muſt haue them deliuered by the executor[h]. And therefore if any ſhold determine to accept ſuch a legacie, it behoueth him by proteſtations or other acte anſwerable, to manifeſt the ſame[i]. Others are of contrarie opinion, namelie that in this caſe ſhe is reputed to haue accepted the thing bequeathed as legatarie, not as executrixe[k]: Becauſe where any act may be doone, or any thing taken or poſſeſſed by a double right, the party is preſumed to doe that act, or to take and poſſeſſe that thinge by force and vertue of that right, which is more fauorable and more beneficiall to the partie[l]. Nowe it is more profitable for euerye one which is both executor and legatary to accept the thing bequeathed as legatarie, then as executor: becauſe the legatarie hath full right in the thinge bequeathed and may diſpoſe therof at his pleaſure[m]: Whereas an executor hath not any ſuch right, but muſt diſpoſe the teſtators goodes to the

f) Plowd. in caſ inter Paramor & Yardley. lib. 2. fol. 543.

g) L. 1. Quorum lega. ff. L. nō dubium. de leg. C

h) Perkins tit. teſtam. c. 7. fol. 94. b.

i) L. deteſtatio. de verb. ſig. L. pro hærede de acquir. hær. ff.

k) Plowd. in d. caſ. inter Paramor & Yardley, vbi variis arg. ſatagit hoc ipſum confirmare.

l) Alciat de præſump. reg. 3. præſump. 36. n. 4. 5. poſt Alex. in L. Gall⁹. §. vlt. de lib. & poſt. ff. n. 10. & Io. And. in c. ſi ſup de offic. del. in 6. Maſcard. tract. de probaç. concl. 42. n. 30.

m) L. legatum. de leg. 2. L. à Titio. de fur. ff.

the only vse & for the onely behoofe of the testator: [n] And therefore vnlesse by solemne protestations [o], or other meanes it maye appeare that the executor did accept of the thinge bequethed as executor, the party shalbe deemed to haue accepted the same as legatary, which opinion (if I doe not erre) is more agreeable to the rules of the ciuill lawe [p]. As for the reason of the other opinion, that a legatarie may not take his legacie of his owne auctoritie: that is true, when an other person is appointed executor, otherwise not [q].

What † if the case be such, as the wife can not 23
make her testament without licence, and that the husband dooth graunt licence to the wife, to make her testament of a certaine portion of his goodes (as many times it hath happened and may againe fall out, by reason of bondes and couenauntes at or before the mariage) and that the wife so licenced to make a testament, dooth first make one testament, and afterwardes an other, and peraduenture the third, or fourth, whether shall the licence bee extended to the last testament, or shall it bee vnderstood of the first testament onely? For that testament is to bee approoued by the ordinarie for the makinge whereof the wife is licensed. Diuers and those of great auctority, are of opinion, that the licence is to be vnderstoode of the first testament, and not to be extended to any other testament [r]. Others are of this iudgment, that the licence is to bee extended to the last testament [s]: otherwise the former testament should

n) c. statutum de testa. §. nulli. lib. 3. puincial. constituc. Cant. Magna charta, c. 18. Perkin. tit. deuise. fol. 97.

o) Nam declaranti pti credendum est, cùm dubitatur an ex hac vel illa causa rem possidebat DD. in d. L. Gerit. ff. de acquir. hæred. Mascard. tract. de probac. concl. 47. n. 9.

p) L. in toto iure. de reg. iur. ff. Mascard. tract. de probac. concl. 45. n. 29. 37. 57. Grauet. consil. 197. n. 4.

q) Sichard. in L. non dubium. C. de lega. n. 53. & Ias. in cad. L. lim. 2

r) Socin. consil. 89. vol. 1 Dec. consil. 512.

s) Sarmentus. tract. de redditibus eccles. ast. c. 4.

ſhould be voyde, becauſe it is reuoked by the latter [t], and the latter teſtament ſhould be voyd for want of the husbands licence: [u] and ſo no teſtament at all ſhould take place; or if the former teſtament were not reuoked by the latter, as being vnlawfull, then it muſt bee graunted that a teſtament may take place not onely without the will, but euen againſt the will of the teſtator [x], whereas it ought to be directed and ruled according to the will of the teſtator, from whence it hath his life & being [y]. And although it be ſo, that when licence is graunted to anie to doe an iterable acte, otherwiſe againſt lawe, it ought to be reſtrained to the firſt acte onely [z], wherof a hūdreth inſtāces might be brought [a]: yet that rule is to be vnderſtood, when the firſt acte dooth or may take effect in the life time of the perſon to whom ſuch licence is graunted [b]. But in our caſe the acte, that is to ſay, the teſtament is of no force before the death of the teſtator [c], and therefore that ought not to miniſter an impediment, which is without effect in lawe [d].

t) §. poſteriore. Inſtit. quib. mod. teſta. infir.
u) Lindw. in c. ſtatutum verb. propriorum vx. de teſta. lib. 3. prouincial. conſtituc. Cant.
x) Quod certè valdè abſurdum eſt. Quum potius tolerandum ſit, vt quis decedat inteſtatus, quàm vt teſtamentum contra voluntatem teſtatoris ſuſtineatur. Mantic. de coniect. vol. lib. 2. tit. 15
y) Supr. prim. par. §. 3.
z) L. Boues. § hoc ſermone. de verb. fig. ff.
a) Tiraquel. in repet. d. §. hoc ſermone.
b) Sarmientus. vbi ſupr.
c) c. Marthæ. de celebr. miſſ. extr.
d) c. non præſtat. de reg. iur. 6.

Of thoſe vvhich be Deafe and Dumbe.

1 *Some perſons are both deafe and dumbe; others deafe but not dumbe; and others againe dumbe but not deafe.*

2 *Whether he which is bothe deafe and dumbe maie make a teſtament.*

3 *Whether he may make a teſtament which is deafe, but*

but not dumbe.

4 *Whether he may make a teſtament which is dumbe but not deafe*

§. x.

WHere it is ſaid, that ſome perſons can not make a teſtament by reaſon of the defect of ſome of their principall ſences [a], that wee may the better vnderſtand who thoſe be; wee are to note † that ſome perſons can neither heare nor ſpeake; others can ſpeake but not heare; ſome againe can heare and not ſpeake [b]. Touching the firſt ſorte †, that is to ſay, thoſe which are both deafe and dumbe, if any be ſo by nature, then can hee not make any kinde of teſtament or laſt will [c]; vnleſſe it doo appeare by ſufficient argumentes, that he vnderſtandeth what a teſtament meaneth, and that he hath a deſire to make a teſtament, for if he haue ſuch vnderſtanding, and deſire, then hee may by ſignes and tokens declare his teſtament [d], if he be not deafe & dumbe by nature. But beeing once able to heare and ſpeake, if by ſome accident afterwardes he looſeth both his hearing and the vſe of his tongue, then in caſe he be learned and be able to write, he may with his owne hand write his teſtament or laſt will, and ſo by arte ſupplie the defect of nature [e]. But if he be not able to write, then is he in the ſame caſe that they are, which be both deafe and dumbe by nature, that is to ſay, if he haue vnderſtãding he may make his teſta-

1

2

a) Supr. ead. part. § j.

b) Minſing. in §. Item ſurdus. Inſtit. quib. non eſt permiſſ. teſta. fac.

c) L. diſcretis. C. qui teſta. fac. poſſ. §. Item ſurdus. Inſtit. quib. non eſt permiſſ. teſta. fac.

d) Dec. in d. L. diſcretis. Tiraque l. de priuileg. piæ cauſæ c. 9. Hoc ſcilicet ſubintellecto, vt in confectione teſtamentorum Anglicorum ſufficiat probatio iuris gentium. Id quod non ſemel dixi, ſed & ſæpiùs eſt dicendum.

e) d. §. Item ſurdus. Inſtit. quibus non eſt permiſſ. teſta fac.

ſtament by ſignes, otherwiſe not at all [f].

f) Dec. in d. L. diſcretis Tiraquel. de priuileg. d. c. 19. piæ cauſæ.

3 Such † as can ſpeake and can not heare, they may make their teſtamentes, as if they coulde both ſpeake, & heare: neither skilleth it whether that defect came by nature, or otherwiſe [g]. But there is none found ſo deafe, but that he is able to heare ſomewhat, if not the crying voice of a man, yet the loude voice of ſome inſtrument, as of a horne, or a trumpet, or a gunne [h]: and if he can ſpeake, it is certaine that hee could once heare, otherwiſe if he could neuer haue heard, he could neuer haue ſpoken, for howe coulde he bee inſtructed to ſpeake, if hee could neuer heare [i].

g) Minſing. in d. §. item ſurdus.

h) Paul. de caſtr. & Iaſ. in d. L. diſcretis.

i) DD. in d. L. diſcretis & in d. § Item ſurdus.

4 Such † as bee ſpeechleſſe onely, and not voyde of hearing, if they be learned, may very wel make their teſtamentes themſelues by writing, or beeing vnlearned, may alſo make their teſtamentes by ſignes, ſo that the ſame ſignes be ſufficient, well knowen to ſuch as then be preſent [k].

k) DD in L. diſcretis.

Of a blinde man.

1 *A blinde man may make a nuncupatiue teſtament.*
2 *Whether a blinde man may make a written teſtament.*

§. xi.

1 HE that † is blinde may make a nuncupatiue teſtament, by declaring his will before a ſufficient number of wit-

witneſſes [a]: But † he cannot make his teſtament 2
in writing vnleſſe the ſame be reade before the witneſſes, in their preſence, and acknowledged by the teſtator for his laſt will. And therefore if a writing were deliuered to the teſtator, and he acknowledged the ſame for his will, this were not ſufficiēt; for it may be that if he ſhold heare the ſame reade hee would not acknowledge the ſame for his will [b].

a) Sed an requirantur omnes ſolennitates, de quibus in L. hac conſultiſſima. C. qui teſta. fac. poſſ. & videtur eas adhiberi debere, quia communi Doctorum opinione, ſolennitas huius L. adhibenda eſt, vel in teſtamento ad pias cauſas, à cæco cōdito; nec aliàs quicquā valet. Graſſ. Theſaur. com. op. §. teſtm̄ q 31.

Ego verò adhæreo Alex. Iaſ. Decio. Sichardo, & alijs in cad. L. hac conſultiſſima. & Tiraquel. qui putarunt hanc ſolennitatem non eſſe neceſſariam in huiuſmodi teſtamento, ſed ſufficere probationem iuris gentium, & hanc opinionem recepit generalis regni noſtri conſuetudo. (b) DD. in d. L. hac conſultiſſima. C. qui teſta. fac. poſſ.

Of Traitours.

1 *Traitours looſe both their liues, landes and goods, and conſequentlie, are inteſtable.*
2 *Traitours are inteſtable not onely from the time of their conuiction, but from the time of the crime committed.*
3 *A traitour pardoned and reſtored, may make his teſtament.*

§. xij.

OF thoſe who are prohibited to make their teſtaments as malefactors (who now are to make their appearance and to ſhew thēſelues in the courſe of this treatiſe) traitours, becauſe they are moſt pernicious to the com-

common wealth, are moſt worthie the firſt place in puniſhments.

1 Vnderſtand † therefore, that whoſoeuer is lawfully conuicted of high treaſon, by verditte, confeſſiō, outlawrie or preſentment, beſides the loſſe of his life, ſhall forfeite to the prince all his goods and cattelles, and all ſuch landes, tenements and hereditaments, as he ſhalhaue in his owne right, vſe or poſſeſſion, of any eſtate or inheritance at the time of ſuch treaſon committed, or at any time after [a], and ſo conſequentlie
2 is inteſtable [b]: in ſo much † that traitours are not onely depriued of making any teſtament, or other kinde of laſt will, from the time of their conuiction, but alſo the teſtament before made dooth by reaſon of the ſame conuiction become voide, both in reſpect of goodes, and alſo in reſpect of lands, tenements and hereditaments [c].

3 Neuertheleſſe if † any perſon being attainted of treaſon obtaine the princes pardon, and be thereby reſtored to his former eſtate; then may he make his teſtamēt as if he had not been conuicted [d]: or if he made any before his conuiction and condemnation, the ſame by reaſon of ſuch pardon recouereth his former force and effect, as hereafter is more fully declared [e].

a) Stat. Ed. 6. an. 5. c. 11.
b) L. quiſquis. §. j. C. ad L. Iul. maieſt. L. ſi quis. de iniuſt. teſt. L. nemo. ff. de leg. 1. Vaſq. de ſucceſſ. progreſſ. lib. 1. §. j. n. 165. qui multis ampli. hanc. concl. ornat.
c) Stat. Ed. 6. an. 5. c. 11. DD. in d. L. nemo. de leg 1. ff & Vaſq. vbi. ſup
d) L. ſi quis. § quatenus ff. de iniuſt. rupt. & irrit. teſta.
e) Infr. 7. part. §. xvij.

Of Felons.

1 *Felons looſe life and goods, and ſo be inteſtable.*
2 *Who ſhall haue felons landes.*

3 *Whether hee that is onely indited of felonie maie make his teſtament.*

4 *Whether he that ſtandeth mute may make his teſtament of his landes.*

5 *Whether a man after he is apprehended for felonie, may make his teſtament.*

6 *Felons goods not to be ſeaſed before attainder.*

7 *The teſtament of a Felon conuicted is void, though he be neuer executed.*

§.xiij.

IF any perſon † be condemned of felonie he ought to ſuffer death, and † the Prince ſhall haue all his goods, where ſo euer they bee found [a]: and if he † haue any *free holde* it ſhall forthwith be ſeaſed into the Princes hands, and the Prince ſhall haue the profite thereof by the ſpace of a yeere and a day, and alſo waſte [b]: and after the Prince haue had it, the yeere and the day, and waſte, the land ſhall be reſtored to the cheefe lord of the fee, except in certaine places, as in the countie of *Gloceſter*, where after a yeere and a day the lands and tenements of felons, ſhal reuert to the next heire to whom it ought to haue deſcended, if the felonie had not beene committed [c]: Or in *Kent* in *Gauelkind*, whereas it dooth deſcend to al the heires males, equally to be deuided, or to the daughters, where there be no ſons, to be deuided amongſt thē, for there it is ſaid, *the father to the boughe, and the ſon to the ploughe* [d]. Felons therfore lawfully conuicted can not make any teſtaments, or other diſpoſitions of anie goods or lands

a) Stat. Eliz. an. 5. c. 14. Termes of law. verb. robberie.

b) Prærog. Reg. c. 16. Eliz. an. 5. c. 14.

c) Prærog. reg. c. 16.

d) Eod. c. 16.

landes, whereof (as wee ſee) the lawe hath diſpoſed already [e].

4 But † if any man be indited onely of felony and die before he be conuicted or attainted, he may make his teſtament of his goods and alſo
5 of his lands [f]: or if † he be indited at the Princes ſuite, and ſo beeing arraigned vpon that inditement will not anſwer, but ſtandeth mute or dumbe, whereupon he is to receiue paine (as it is tearmed) *Forte & Dure*, and bee preſſed to death [g]. In this caſe *his goods onely* be confiſcate, but not his lands [h], and therefore in this caſe I ſuppoſe he may make his teſtament of his landes [i].

6 If a felon † bee indited, and afterwards attainted by verdit or confeſſion, the time of the fact committed compriſed in the inditement, is to be regarded in reſpect of his lands: but in reſpecte of his goodes, in the time of his iudgement [k]. And therefore if before iudgement he doe ſell, giue, or otherwiſe alienate his goodes, ſuch ſaile, gift, or alienation is good [l]. Neither
7 † may the Sherife or other perſon, take or ſeaſe the goods of any perſon arreſted and impriſoned, before the ſame perſon be conuicted or attainted of felonie, according to the law, or that the goods bee otherwiſe lawfullie forfeited [m]. Howe be it if hee make his teſtament before the condemnation, for as much as the teſtament is not good before his death [n], ſuch diſpoſition beeing preuented by iudgement or condemnation, is made fruſtrate [o], in ſo
8 much that if the † teſtator beeing conuicted

e) Duplici ratione damnatus ad mortem, fit inteſtabilis: nimirum, bonorum publicatione & damnatione ad mortem. Damnatus autem ad mortem naturalem efficitur ſeruus pœnæ, quod communi opinione nititur, aduerſus eos, qui exiſtimarunt ingenuum hodie non effici ſeruum pœnę huiuſmodi damnationes ſed procedit prior opinio, ſiuè quis damnatus ſit ſecundum ius commune, ſiuè etiam ſecundum ſtatutum alicuius loci. Iul. Clar. §. teſtm̃. q. 21. Couar. in Rub. de teſta. extr. 3. part. n. 27. Michael. Graſſ. Theſaur. com. op. §. teſtm̃. q. 26.

f) Quia non condemnatus non reperitur prohibitus. vide ſtat. R. 3. an. 1. c. 3.

g) Do. & Stu. lib. 2. c. 41.

h) ibidem.

i) Quia viz. non prohibetur, q̃ non condẽnatur.

k) Perk. tit. grants. fol. 6

l) Perkins. vbi ſupr. cõcordat ius ciuile. L. poſt contractum. ff. de donac. cum diſtinctione tamen, vt per Bar. in d. L. Graſſ. §. teſtm̃. q. 26.

m) Stat. R. 3. an. 1. c. 3.

n) c. Matthę. de celebr. miſſ. extr.

o) Panor. in Rub. de teſta. extr. Iul. Cla. §. teſtm̃. q. 21. Graſſ. §. teſtm̃. q. 26 Vaſq de ſucceſ. reſol. lib. 1. §. 6. n. 18.

of felonie, be neuer executed, for that perhaps he dieth in priſon, or eſcapeth out of priſon & dieth naturally: yet is the teſtament voyde by force of the condemnation[o], vnleſſe hee doo obtaine his pardon, and there withall full reſtitution to his former eſtate[p].

o) Panor. in Rub. de teſta. extr. Iul. Clar. §. teſtm. q. 21. Graſſ. §. teſtm. q. 26. Vaſq. de ſucceſſ. reſoluc. lib. 1. §. 6. n. 18.

p) L ſi quis. §. quatenus ff. de iniuſt. teſto.

Of Heretikes.

1 *An heretike can not make a teſtament.*
2 *Whether and when dooth an heretike forfeite his landes or goods.*
3 *Whether is the teſtament good, if the heretike were neuer conuicted.*
4 *An heretike may be condemned after his death.*
5 *Whether an heretike hauing reclaimed his hereſie. may make a teſtament.*

§. xiiij.

AN † heretike can not make a teſtament[a]. And albeit by the lawes and cuſtomes of this realme an † heretike do not forfeite his lands; vnleſſe beeing deliuered to laye mens handes, he be executed for his hereſie[b]; nor his goods, vnleſſe being cõuicted of hereſie, he be deliuered to lay-mens handes[c]: Yet if he be conuicted, and publikelie excommunicated, though not as yet deliuered, he can not make a teſtament of his goods or cattels[d]. 1 2

If he † were neuer conuicted of hereſie, and yet die an vndoubted heretike, in this caſe it may 3

a) Auth. credentes. C. de hære. Lindw. in c. 1. de hæret. Vaſq. de ſucceſſ. reſoluc. lib. 1. §. iiij. n. 23. Simo de Prætis. de inter. vlt. vol. lib. 2. dub. 1. ſoluc. 4.

b) Doct. & Stud. lib. 2. c. 29.

c) Ibidem.

d) Bar. in d. Auth. credentes. Graſſ. § teſtm. q. 24. Clar. § teſtm. q. 24. Gabr. com. conc. lib. 4. tit. de teſta. c. 1. Quære tamen p ſtat. 2. Hen. 5. c. 7.

may ſee me that his teſtament is void, in reſpect of his goods; the rather by force of the excommunication, into the which by reaſon of his hereſie he did fall *ipſo facto* [c], eſpecially if in his life time he were ſo publikely denounced [f]: yea
4 though he were not ſo denounced, yet † ſo odious is the crime of hereſie, that hee may bee condemned of hereſie after he bee dead [g]: at leaſt the exception of inteſtabilitie, may be oppoſed againſt the probate of the teſtament [h]. If
5 the † teſtator reclaime his hereſie, thē he is not inteſtable; although hee did not reclaime the ſame before condemnation, ſo that hee doe it before he be deliuered to the ſeculer power [i]. But how ſo euer he recouer abilitie to make a teſtament, which reclaimeth his hereſie, yet the teſtament made by an heretike, whiles he perſiſtethin his hereſie, doth not recouer any force by ſuch recantation [k]: and if he fall againe into the hereſie, by ſuch relapſe hee dooth incurre all the puniſhments, whereunto he was ſubiect before: neither is his recantation any more to be accepted [l].

c) c. Abolend. de ſen. excom. extr. Lindw. in d. c. 1. de hæretic. & inf. ead. part. §. 18.

f) At non ſufficit excōmunicatio, etiam ob crimen, quo efficitur quis inteſtabilis, niſi ſit publicata, ſi verum dicat Simo de Prætis. de interp. vlt vol. lib. 2. fol. 148. n. 75.

g) c. ſanè profertur. 24. q. 2. L. ex iudiciorum ff. de accu. L. Manichæos. C. de hæret. c. vrgentis de hær. extr. Iul. Clar. §. hæreſis. n. 21. Ægid. Boſſ. tract. var. tit. de hæretic. Bellam. dec. 677. cum ſeq.

h) Per ea quæ habet Dec. in L. 1. de ſecundis nuptijs. C. n. 7. Cardinal. in clem. eos de ſepultur. q. 19. & infr. ead. part. §. 18.

i) Hoc verum iure quo nos vtimur, nam iure ciuili reclamans hæreſim poſt ſententiam ſolùm euitat pœnam mortis. Panor. in c. pen. de hæret. extr. Boer. deciſ. 343. Boſſ. tract. var. tit. de hæreticis.

(k) Simo de Prætis. de interp. vlt. vol. lib. 2. dub. 1. ſoluc. 4. n. 56. cuius rei ratio eſt, quia teſtū fuit ab initio nullum.

(l) Clar. Boſſ. Carerius, Grillandus, & alij de hæreticis.

Of an Apoſtata.

1 *An Apoſtata can not make a teſtament.*
2 *An Apoſtata woorſe then an heretike.*
3 *Who is an Apoſtata.*
4 *The ſtate of the heretike and of the Apoſtata damnable*

nable.

5 Three kindes of Apoſtaſie.

6 Euery Apoſtatae is not inteſtable.

§.xv.

THat † which hath beene ſpoken of an heretike may alſo be verified of an Apoſtata [a]. For he is † as bad or rather worſe and more execrable [b]. For † an Apoſtata is he which dooth wholie ſtarte backe from the Chriſtian faith, which once hee did profeſſe and wherin hewas once baptized, and becommeth in profeſſion a Iewe, or a Turke, or ſome other infidel approouing their deteſtable rites, and ſuperſtitions: wheras an heretike, albeit he doo obſtinately perſeuer in his error; yet he erreth not wholy, but particularly in ſome part of chriſtian religion [d]. Both in truth are abhominable and the † ſtate of either miſerable, and damnable. But of the two the Apoſtata is more horrible, and better were it neuer to haue knowne the way of trueth, then after the knowledge thereof, to reiect it or ſtart away from it [e]; worthily therefore is the Apoſtata to be as ſeuerelie puniſhed, as an heretike [f].

1 2 3 4

There † be three kinds of Apoſtaſie: *Perfidiæ*, *Inobedientiæ*, *Irregularitatis*; one of misbeleefe, an other of diſobediēce, the third of irregularitie [g]. Apoſtaſie of misbeleefe is where a man dooth vtterlye forſake the chriſtian beleefe, as mention is made before: ſo did *Iulian* the Apoſtata.

5

a) L. 1, 2, & 3. C. de apoſtat. Summa Hoſtienſ. tit. de apoſtat. §. qualiter.

b) Weſenb. in tit. de apoſt. C. L. vlt. C. cod.

c) Summa Hoſtienſ. tit. de apoſtat. extr. c. non poteſt. 2. q. 7. c. quidam de apoſt. & c. contra chriſtianos, de hære. 6.

d) Summa Hoſtienſ. tit. de hære. & de Apoſta.

e) 2. epiſtol. Petr. c. 2. verſ. 21. epiſt. Paul. ad Hebræos. c. 6. verſ. 6.

f) Panor. in c. 1. de apoſtat. ext.

g) Summa Hoſtienſ. tit de apoſta. § quot ſpecies.

poſtata. Apoſtaſie of diſobedience is, when the ſubiect refuſeth to obey the lawfull commaundement of his ordinary or ſuperior[h]: and ſo do many Anabaptiſtes at this day. Apoſtaſie of irregularity is, when he that hath entred into the miniſtery and taken holy orders, forſaketh his ſpirituall profeſſion; and becommeth not in habite onely, but in actions a laie man[i]: But † I 6 ſuppoſe that an Apoſtata from obedience, or from ſpirituall profeſſion, is not diſabled to make his teſtament[k], though he bee worthilie ſubiect to other greeuous puniſhments[l].

h) Summa Hoſtienſ. d. tit. de apoſta. epiſt. ad Hebr. c. 13. verſ. 17.
i) c. à nobis. de apoſta. extr.
k) Bar. in Rub. de apoſta. C.
l) De quibus Ab. in c. 1. de apoſta. ext. & Hoſtienſ. ſumma eod. tit. §. qualiter puniantur.

Of Vſurers.

1 *A manifeſt vſurer can not make a teſtament.*
2 *Euery vſurer is not inteſtable.*
3 *Who is a manifeſt vſurer.*
4 *Whether one acte may make an vſurer to be manifeſt.*
5 *VVhether he be an vſurer which lendeth for gain, but dooth not receiue any more then the principal.*
6 *An vſurer is not inteſtable in England, vnleſſe hee take aboue* 10. *in the* 100. *for a yeeres forbearaunce, or after that rate.*
7 *The puniſhment for vſury in England.*
8 *A manifeſt vſurer is not to bee buried in anie church or churchyard.*

§. xvj.

1 † Manifeſt vſurer cannot make a teſtament, and though he make one, it is voyd in law concerning goods

and cattelles, vnlesse he satisfie for the vsury, or put in caution for satisfaction to be made[a].

a) c. quanquam de vsur. lib. 6. Clar. §. testim. q. 26 Michael Grass. Thesaur. com. op. §. testim. q. 33.

Where it is † said, a manifest vsurer, we are to note, that not euery vsurer is excluded from making a testament, but a manifest vsurer onely[b], that is to say, † such an one as hath beene condemned for an vsurer, or hath publikly confessed that he hath taken vsurie, or is publikelie reputed and taken for a vsurer amongest his neighbours, who are presumed to know his life and conuersation[c]. And † albeit some are of this opinion, that a man can not be said to be a manifest vsurer, vnlesse he haue diuers times taken vsurie[d], yet that opinion is not holde for sound, amongst the writers of the ecclesiastical laws; who thinke that a man may be a manifest vsurer, by occasion of one onely acte the same being publike and manifest[e]. Neuertheless † it is not sufficient in lawe to depriue a man of the auctority or libertie of making a testament, because he hath lente his mony or goods to vsurie, vnlesse he haue taken encrease, ouer and aboue the principall[f]. Neither † is it sufficient, to haue taken vsury, and that manifestlie, to the effect of making the vsurer intestable; vnlesse he haue receiued aboue the summe of 10. pound for the lone or forbearing 100. poūd for one yeere or after that rate[g]. For † although all vsury be worthily condemned by the lawes and statutes of this realme, as vnlawfull and vngodly[h]: Yet neuertheless euery kind of vsury, is not punishable with like penaltie: for if anie doo receiue vsurie onely after the rate of 10. pound

b) d. c. quanquam. & ibi gloss. & DD.

c) Gemi. & Franc. in d. c. quanquam.

d) Bar. in L. 3. de furt. ff

e) Card. in clem. eos de sepul. q. 19.

f) Dom. & Franc. in d. c. quanquam de vsur. lib. 6. Ripa. respons. 116.

g) Stat. Eliz. an. 13. c. 8.

h) d. Stat.

1 2 3 4 5 6 7 8

pound in the hundreth for a yeeres forbearance, or vnder that rate, he ſhall onely forfeite ſo much as ſhal be reſerued or receiued by way of vſurie aboue the principall[i]: but if any ſhall receiue aboue that rate, hee dooth not onelie looſe his principall together with the intereſt, but is alſo to be puniſhed and corrected accor-
8 ding to the lawes eccleſiaſticall[k]. By † the which lawes eccleſiaſticall, if any be a manifeſt vſurer, not onely his teſtament is voide, as is aforeſaid, but his body after he bee dead is not to be buried amongſt the bodies of other chriſtian men, in any church or church-yard, vntill there be reſtitution or caution tendered according to the value of ſuch goods[l].

i) Ibidem.

k) Eod. ſtat. Eliz. an. 13. c. 8.

l) d. c. quanquam, de vſur. 6.

Of Inceſtuous perſons.

1 *Whether inceſtuous perſons may giue any thing by their teſtament and to whom.*
2 *VVhat mariages be inceſtuous.*
3 *VVhat degree of conſanguinitie dooth hinder mariage.*
4 *Certaine caſes wherein the teſtators may bequeath ſome thing to their inceſtuous children.*

§. xvij.

1 HE † which dooth contracte inceſtuous mariage, is prohibited to diſpoſe any goods or cattelles by his teſtament or laſt will, either to his children begotten in ſuch inceſtuous mariage, or

to any other perſon [a], ſauing to his children begotten in lawfull mariage (if he haue any by a former wife) or to his parents, or to his brother, or ſiſter, or to his vncle or aunte [b]. By † inceſtuous mariage in this place, I vnderſtande ſuch mariages as are ſolemnized or had betwixt a man and a woman, being of kinred or aliaunce, the one to the other, within thoſe degrees of conſanguinitie or affinitie, within the which it is not lawfull to marrie [c]; that is to ſay, within the leuiticall degrees, or the degrees prohibited by Gods lawe. For at † this preſent, by the ſtatutes of this realme it is declared and eſtabliſhed, to be lawfull for all perſons to marry, which be not prohibited by Gods law; and that no prohibition (Gods lawe excepted) ſhall trouble or impeach any mariage, without the leuitical degrees [d]. And therfore whoſoeuer dooth marie being prohibited by Gods lawe, or being within the leuiticall degrees, can not diſpoſe any thing by his teſtament but to the perſons aboue named, and eſpeciallye not to his or her children begotten in ſuch inceſtuous mariages; vnleſſe † the parentes were ignoraunt of the impediment of ſuch conſanguinitie or affinitie [e]: In which caſe the mariage being publikly ſolemnized; the children which are borne during ſuch their ignoraunce, or the ignorance of one of them are legitimate [f], albeit the parentes afterwardes ſhould be diuorced [g]: or vnleſſe ſo much onely were lefte vnto their ſaid children, as would ſerue for their competent ſuſtentation or nouriſhment [h]: or vnleſſe the

2

3

4

a) L. ſi quis. C. de inceſt. nup.

b) d. L. ſi quis. Per liberos autem intellige nō ſolùm filiam & filiam, ſed nepotem, & neptē, & deinceps alios vtriuſque ſexus deſcendētes: & per parentes, nō ſolùm patrem & matrem, ſed etiam auum, auiam, & alios aſcendentes. Accurſ. Bald. & alij in d. L. ſi quis. Simo de Prætis. de interp. vlt. vol. lib. 2. dub. 1. ſoluc. 4. n. 92.

c) Couar. de ſponſ. & matr. 2. part. c. 6. §. 8. c. lex illa. §. inceſtus. 36. q. 1.

d) Stat. H. 8. an. 32. c. 38.

e) Simo de Prætis. de interp. vlt. vol. lib. 2. dub. 1. ſoluc. 4 n. 92.

f) c. cum inhibitio. §. ſi quis. de cland. deſponſ. ext. & ibi Panor. Brook. tit. baſtardie. n. 23. Fitzherb. tit. baſtardie. n. 2.

g) Couar. epit. de ſponſal. 2. part. c. 8. § 1. contrarium tenet Brook. tit. baſtardie. n. 23. & alibi p eundem inter ſuos caſus, an. 24. Hen. 8. quem locum diligenter obſerues cupio.

h) Illud ita iure Can. c. cū haberet. de eo qui dux. in vx. ext. quod. c. locum habet nō ſolū in ſpurijs, ſed etiam in inceſtuoſis, vt eſt com. op. teſte Decio, in c. in patria de prob. extr. n 39. Gabr. lib. 6. de alimen. concl. 1. n. 5.

the children were appointed bare executors without any other benefit: In which caſes the teſtamente is good[i], as heereafter more at large[k].

i) Inf. 5. part. §. 7 Petr. Duen. reg. 366. Limit ac 9. verb. filius. Simo de Prætis. de interp. vlt. vol. lib. 5. fol. 17. n. 27.
k) Infr. part. 5. §. 7.

Of a Sodomite.

1 *VVho is a Sodomite.*
2 *A Sodomite can not make a teſtament.*
3 *VVhat if he were neuer condemned of Sodomitrie.*

§. xviij.

1 A † Sodomite, that is to ſay, he or ſhe that dooth commit that wicked & horrible ſinne againſt nature, as did the Sodomites, whereof mentiō is made in the holy ſcripture[b], 2 is † prohibited to make a teſtament[c], and to bequeath his goods and cattelles. And albeit hee 3 were neuer conuicted, † or condemned thereof in his life time, yet I ſuppoſe this exception may be obiected againſt the probate of the teſtament[d], for that he was inteſtate at the time of the fact committed[e].

a) Sodomia autem dicitur non ſolùm illud nefandum peccatum inter maſculos, ſed etiã flagitium illud contra naturam cum fœmina. Et hæc opinio communis eſt contra Socin. contendentem iſtiuſmodi peccatum, non ſodomiam, ſed extraordinariam quandam pollutionem dici debere, quem DD. communiter reprobant, vt refert Viuius, lib. com. op. verb. ſodomia. Dec. in L. j. de ſecundis nuptijs. n. 9. C. Card. in clem. 1. de conſang. & aff. q. 13. (b) Gen. c. 19. (c) Spec. de Inſtr. edit. §. compendioſo. n. 5. (d) Dec. in L. 1. de ſecundis nup. C. Simo de Prætis. de interp. vlt. vol. lib. 2. dub. 1. ſoluc. 4. n. 97. (e) Simo de Prætis. & Dec. vbi ſupra. Adde Cardinal. in clem. eos. de ſepul. q. 19.

Of a Libeller.

1 *VVhat is a famous Libell.*
2 *A Libeller inteſtable.*

§ xix.

§.xix.

a) Famosum quandoq; in malam partem sumi multis exemplis ostēdit Petrus à Placa. epit.delict. c.3.
b) Summa Angel.Summa Siluest.verb.libell⁹.
c) L.si cui.§.si quis.ff. de testa.L.vnic.de famos.libel.C.Petr.à Pla. epit.delict.lib.1.c.3.

† Famous [a] Libell is a writing made to the infamie of any man, published abroad to that ende [b]: and he that † is condemned for deuising, writing, or publishing the same, is thereby depriued of the abilitie of making a testament, or disposing of any his goods or cattelles [c]. 1 2

Of him that killeth himselfe.

§.xx.

a) L.si quis filio.§.eius. de testa.ff.L.2.qui testa.fac.poss.C.

b) Vasq.de succes.resoluc.lib.1.§.3.n.31.

IF any mā do wittingly & willingly kil himself, his testamēt, if he made any, is voyd [a], both concerning the appointment of the executor, and also concerning the legacie or bequest of any goods, for they are confiscate [b].

Of him that is outlawed.

1 *An outlawed person looseth his goods and benefite of the lawe.*
2 *VVhat if the action be personall?*
3 *VVhat if the action be vniust?*
4 *VVhether an outlawed person may make his testament?*
5 *VVhat if the prince giue the goods to the executor, whether is he therefore chargeable with the paiment of legacies?*

6 *He that is outlawed dooth ſome time forfeite not goods onely but lands alſo.*

7 *An outlawed perſon may make his teſtament of landes not forfeited.*

8 *An outlawed perſon may aſsigne tutors teſtamentarie to his thildren.*

9 *Certaine other caſes, wherein hee that is outlawed may make his teſtament.*

§. xxj.

1 AN † outlawed perſon is not onely out of the protectiō of the Prince, & out of the aid of the laws of this realme [a], but alſo all his goods and cattelles be forfeited to the Prince, 2 by meanes of the outlawrie [b], although † hee were outlawed but in an action perſonall [c], and 3 although † alſo the action peraduenture were not iuſt: neuertheleſſe his goodes and catelles are forfeited, by reaſon of his contempt in not appearing: for it is a *maxime* in the common lawes of this realme, that he that is outlawed doeth forfeite all his goods and cattelles to the Prince; without diſtinction whether the action be iuſt or vniuſt [d]. And therefore † it followeth, 4 that he that is outlawed can not make his teſtament of his goodes ſo forfeited [e]. In ſo much 5 that † if the prince hauinge ſeaſed the forfeited goods of the teſtator, ſhould giue the ſame againe to the executor; neuertheleſſe the teſtament is voide in reſpect of ſuch goods; neither can the legatarie recouer the ſame at the hands of

a) Fitzher. Nat. Br. fol. 161. Termes of law. verb. vtlegarie.

b) Doct. & Stu. lib. 2. c. 3

c) Termes. vbi ſupr.

d) Doct. & Stu. lib. 2. c. 3

e) Iul. Clar. §. teſtim. q. 19.

of the executor [f], for by the forfeiture and ſeaſin the propertie thereof is altered, and ſo ceaſing to bee the goodes of the teſtator, doe not charge the executor, as aſſets [g].

If † the teſtator be outlawed by an outlawrie for felonie, then he doth not onely forfeite his goods and cattelles, but alſo his landes and tenementes, whether they be holden in fee ſimple or for terme of life [h]: And hee that is thus outlawed, can neither make his teſtament of thoſe goods nor of thoſe landes, for they are none of his. 6

Howbeit † I ſuppoſe that he that is outlawed in an action perſonall, may make his teſtament of his landes, for they are not forfeited [i]. 7

Or if † he doe aſſigne tutors to his children (as within the prouince of Yorke and other places by cuſtome there vſed parentes may doe [k]) the ſame aſſignation is to be confirmed [l], by the ordinarie to whom the probate of teſtaments appertaineth. 8

Or † if there be any error or diſcontinuaunce in the ſute, or proceſſe, by meanes whereof the outlawrie is reuerſed or anulled: Or if the partie outlawed were beyond the ſeas at the time of the outlawrie pronounced [m], or if three proclamations were not made according to the ſtatute lately made in that behalf, viz. one in the open countie courte, an other at the generall quarter ſeſſions, & the third at the church or chappell where the partie defendant dwelleth [n]; in reſpect whereof the outlawrie is reuerſed and voide: In theſe and like caſes the teſtament is good, notwithſtanding ſuch outlawrie: 9

And

f) Doc. & Stu. lib. 1. c. 6.
g) Doc. & Stu. lib. 2. c. 3. & lib. 1. c. 6
h) Termes of law. verb. vtlegat.
i) Vide quæ ſequuntur hoc §. litera L. quo etiã tendit quod ſcripſerũt Brook. Tit. Gard. n. 6. & Perkins. tit. grants. fol. 6.
k) Infr. part. 3. § vij.
l) Is enim qui noſtratibus dicitur vtlegatus, parùm differt à relegato: Cùm relegatio (ſicut vtlegatio) nihil aliud eſt, quàm exilium temporarium. L. relegati. ff. de pœn. Quinimo & relegati quandoque (prout etiam vtlegati) bona confiſcata ſunt. Iul. Clar. §. teſtm̃ q. 22. Attamen non amittit teſtm̃. factionẽ relegatus quoad bona, ſi quæ ſint non confiſcata. Iul. Clar. d. q. 22. Quare, ſicut relegatus, ita etiam vtlegatus teſtandi facultatem retinet: Si quid ſuperſit non proſcriptum, ſiue publicatum. Porrò bannitus non eſt inteſtabilis. Clar. q. 17. Deniq; nec deportatus ad pias cauſas. Graſſus. §. teſtm̃ q. 17. n. 9. multò minùs efficitur vtlegat⁹ inteſtabilis, quoad eã quæ non ſunt applicanda fiſco.
m) Termes of law. verb. vtleg.
n) Stat. Eliz. an. 31. c. 3.

And ſo it is if pardon be obtained, and he thereby fullie reſtored °. o)L.ſi quis.§.quatenus.de iniuſt.teſt.ff.

Of an Excommunicate perſon.

1 *An Excommunicate perſon may make a teſtament.*
2 *Sauing in certaine caſes.*

§.xxij.

1 WHether † an Excommunicate perſon may make a teſtament or not is a queſtion which hath many patrons, both of the affirmatiue and negatiue parte, howbeit the affirmatiue hath moe in number. And thoſe alſo greater in weight or auctority[a]: And this affirmatiue concluſion proceedeth, although he be publikelie exommunicated[b], vnleſſe he be † excommunicate for hereſie, or manifeſt vſury, or for ſome other cauſe, for the which he is prohibited to make any teſtament[c]: or vnleſſe he be excommunicate with that great curſe, which is called *Anathema*, which is not to bee inflicted but vpon great cauſe, with great deliberation and ſolemnitie[d]. 2

a)Gabr.Rom. lib.4.cō. concl.tit.de teſta. concl.1.Graſſ.Theſaur.com.op.§.teſtm̄. q.24.Petr. Duen. tract. reg.& fall. vbi citantur & huius,& illius opinionis Authores pænè infiniti.

b)Graſſ.& Duen.vbi ſupra.

c)Sed an hîc etiam opus ſit denunciatione; vide quæ ſuperiùs dicta ſunt ead.part.§. 14.& § 18.

d)Socin.tract.reg.& fall.verb. excommunicatus.

Of Prodigall perſons.

1 *Diuers perſons inteſtable by the ciuill lawe, which are not prohibited by the lawes and cuſtomes of this realme.*

§.xxiiij

§.xxiiij.

a)De quibus Vigelius in ſua method. iur. ciuil. lib. 9. c. 5. & 6. cum ſequentibus.
b)L. is cui. ff. de teſta. §. Item prodigus. Inſtit. quibus non eſt permiſſ.
c)L. de ſtatu. de teſta. ff.
d)L. qui in poteſtate. ff. de teſta.

OThers † alſo for other cauſes are forbidden to make their teſtaments, by the ciuill lawe[a], namely prodigall perſons[b], and ſuch as are doubtfull of their ſtate of freedome or bondage[c]; the ſon alſo, ſo long as his father liued (in whoſe power he was) could not make a teſtament, by the ciuill lawe[d]. But ſeeing the lawes of our realme are contrarie, I ſhal not neede to enter into any diſcourſe of that lawe about theſe perſons. 1

Of him that hath ſvvorne not to make a Teſtament.

1 *It is an olde queſtion, whether he that hath ſworne not to make a teſtament, may notwithſtanding make a teſtament.*
2 *The greater parte holde the affirmatiue.*
3 *No cautele vnder the ſame whereby the libertie of making a teſtament, may be taken away.*
4 *Whether it be needefull that the teſtator doe expreſlie reuoke his oath.*

a)De qua. q. Bar. in L. ſi quis. ff de leg. 3. Io. And. in c. quod ſemel. de reg. iur in 6. Bald, in Auth. hoc inter. C. de teſta. Spec. de Inſtr. edi. §. compendioſe. verſ. quid ſi quis. Summa Hoſtienſ. tit. de ſepulturis. §. an licitum. Oldrad. conſ. 127.

xxv.

IT is † an olde queſtion, whether he that hath taken an oth not to make a teſtament, may notwithſtanding make a teſtament[a]: and † although there were many which did hold, 1 2

that

that in this caſe he could not make a teſtamẽt[b], yet the greater nũber are of the contrarie opinion[c]; eſteeming the othe not to be lawfull, and conſequently not of force to depriue a man of the libertie of making a teſtament[d]. And therefore if a mã firſt make a teſtament, & then ſweareth neuer to reuoke the ſame, yet notwithſtanding he may make an other teſtament and therby reuoke the former[e]: for † there is no *cautele* vnder heauen, whereby the libertie of making or reuoking his teſtament can be vtterly taken away[f]. Howbeit if † the teſtator will make his teſtament contrarie to his othe, then it is neceſſarie that he reuoke his othe alſo, for the former teſtament is not reuoked, vnleſſe the othe be alſo ſpecially or expreſſlie reuoked[g].

3

4

b) Specul. Hoſtienſ. Oldrad. & alij. vbi ſupra.

c) Bar. in d. L. ſi quis. Iul. Clar. §. teſtm. q. 94. Michael Graſſ. §. teſtm. q. 87. Soarez. lib. rec. ſenten. verb. teſtm. n. 67. & hæc opinio proculdubio communis eſt, teſtimonio eorundem Clar. Graſſ. Soarez.

d) Bar. vbi ſupr. cui accedunt etiam Olden. de action. claſſ. 5. in prin. Couar. in Rub. de teſta. extr. 2. part.

e) Bar. Clar. Graſſ. vbi ſupr. Gabr. lib. 2. com. concl. tit. de iureiuran. concl. 1. n. 8. cum infinitis alijs.

(f) Bar. & Olden. vbi ſupra. (g) Iul. Clar. §. teſtm. q. 94. Soarez. lib. rec. ſen. verb. teſtm. n. 67. Graſſ. §. teſtm. q. 87. vbi dicit hoc eſſe valdè notandum.

Of him that is at the verie point of Death.

1 *He that is at the pointe of death cannot alwaies make his teſtament.*

2 *VVhat if it appeare that he is of perfite minde and memorie.*

3 *VVhat if his words can ſcarcely be vnderſtood.*

4 *VVhat if it bee doubted whether hee bee of perfite minde and memorie.*

5 *Whether the teſtament made at the point of death by the motion of an other be good or not.*

6 *What if the perſon be ſuſpected which dooth aske the queſtion.*

7 *They which be extreamely ſicke doo eaſilie anſwer (yea) to anie queſtion.*

8 *The former teſtament is not reuoked by the ſecond, made by him that is readie to die at the interrogation of a ſuſpected perſon.*

9 *Whether the teſtament be good, which is made at the interrogation of a perſon not ſuſpected.*

10 *What if the ſicke mans meaning doo not appeare but by his bare anſwer.*

11 *Whether that teſtament bee good, which beeing written by the Kinsfolkes of the ſicke man, and afterwardes reade vnto him, and hee demaunded whether he be content to haue the ſame ſtande for his will, anſwereth (yea?)*

§.xxvi.

WHether † he that is at the very pointe of death may make a teſtament, or whether the teſtament made by him when hee is halfe dead bee good or no, may be knowen by theſe caſes following. 1

The firſt caſe is, when a man beeing ſo extreamely ſicke, that he is wel nie dead, yet † neuertheles it appeareth vndoubtedly by his geſtures & ſēſible ſpeeches, that he is of good vnderſtanding and ſounde memorie; in this caſe there is no queſtion, but he may make his teſtament [a], for the integritie of the minde, and not of the bodie, is required in the teſtator [b], and the libertie of making a teſtament, dooth continue euen vntill the laſt gaſpe [c]. In ſo much that † if the teſtator bee not able to pronounce his 2 3

a) L. quoniam indignum. C. de teſta. & DD. ibidem. Mātic. de coniect. vlt, vol. lib. 2. tit. 6. Simo de Prætis. de interp vlt. vol. lib. 2. dub. vlt. ſoluc. 4.

b) L. 2. ff. de teſta. L. ſenium. C qui teſta. fac. poſſ.

c) L. 4. de adimen. leg. ff.

his wordes ſo plainely and diſtinctly as he had beene accuſtomed, but ſcarcelie and with great difficultie can be vnderſtood of ſuch as be preſent, (his tongue perhappes being ſwolne or become ſtiffe, and vnrulie, or otherwiſe diſturbed by meanes of his ſickneſſe,) yet dooth not the teſtament therefore looſe his force or vertue [d].

d) d. L. quoniam indignum. Simo de Prætis. vbi ſupr. Phil. Franc. in Rub. de teſta. lib. 6. Alex. conſil. 33. vol. 3. n. 7.

4 The ſecond caſe is, † when a man is at the pointe of death, but it dooth not appeare plainely whether hee bee of perfect minde and memorie. In which caſe, ſome are of opinion, that neuertheleſſe he is to be preſumed of perfect minde and memorie [e]. Others are of the contrarie opinion, comparing him that is in this caſe to a dead man, partely through the intollerable extremitie of the ſickneſſe, and partly through the cogitation of imminent death [f]. Others more indifferent do reconcile theſe contrarie opinions, with this diſtinction: either the ſicke perſon dooth ſpeake ſo diſtinctlie as hee may be vnderſtood, and then he is preſumed to be of perfect minde and memorie, and ſo to be in that caſe that he may make his teſtament: or elſe hee can not ſpeake ſo diſtinctly as hee may be vnderſtood, and then hee is not in caſe to make his teſtament [g].

e) Panor. in c. fin. de ſucceſſ. ab inteſtat. extr. n. 9.

f) Paul. de Caſtr. conſil. 155. vol. 1.

g) DD. in L. iubemus. C. de teſta. Mantic. de coniect. vlt. vol. lib. 2. tit. 6. n. 5. Viglius in §. ſed cùm paulatim. Inſtit. de teſt. ord. vbi hoc diſtinctionum ſœdere conciliat iſtas contrarias leges, nempe L. quoniam indignum. & L. iubemus. C. de teſta.

5 The † third caſe is, when hee that is at the point of death and hardlie able to ſpeake, ſo as he may be vnderſtood, dooth not of his owne accorde make or declare his teſtament, but at the interrogation of ſome other, demaunding of him whether he make this or that perſon his

executor, and whether he giue such a thing to such a person, answereth yea, or I doo so. In which case it is a question of some difficultie, whether the testament be good or not, neither can it be answered simplie, either negatiuelie, or affirmatiuelie, but diuerslie in diuers respects [h], for if †he which doth aske the question 6
of the testator, be a suspected person [i], or be importunate to haue the testator to speake [k], or make request to his owne commoditie [l]; as if he say, doe you make me your executor, or doe you giue me this or that? And therupon the testator answer yea: in this case, it is to bee presumed, that the testator did answer, yea, rather to deliuer himselfe of the importunitie of the demaundant, then vpon deuotion or intente to make his will [m]; becaufe it † is for the most part 7
painefull and greeuous to those that be in that extremitie, to speake or bee demaunded anie question: and therefore are readie to answere (yea,) to anie question [n] almost, that they may be quiet: which aduantage, craftie and couetous persons knowing verie well, are then most busie, and doo labour with toothe and naile, to procure the sicke person to yeelde to their demaundes, when they perceiue he cannot easilie resist them, neither hath time to reuoke the same afterwardes beeing then passing to an other world [o]. And therfore worthilie and with great equitie and reason, is that to be deemed, for no testament, when the sick person answereth, yea, the interrogation beeinge made by a suspected person; aswell in respect of presump-

h) De hac q. consulas velim Mantic. de coniect. vlt. vol. lib. 2. tit. 6. & Gab. Rom. lib. 4. cõ. conclus. tit. de testa. concl. 2. vbi non paucis contentus est distinctionibus.

i) Paul. de Castr. consil. 155. col. pen. vol. 1 Zas. cons. 3. vol. 1. n. 37. Socin. Iun. consil. 183. n. 27. vol. 2. qui refert. hanc op. esse magis com.

k) Zas. d. cons. 3 n. 37. vol. 1. vbi attestatur hanc op. esse com.

l) Socin. d. consil. 183. vol. 2. n. 39. Sichard. in L. iubemus. C. de testa. n. 7. in fin.

m) Paul. de Castr. in L. hac consultissima §. at cum humana. C. qui testa. fac. poss. Mantic. de coniect. vlt. vol. lib. 2 tit. [illegible]. n. 10. Socin. Iun. consil. 144. vol. 2. n. 49. Sichard. in d. L. iubemus. C. de testa. n. 7. Peckius. tract. de testa. coniug. lib. 1. c. 17.

n) Hic, cui moribundus (ait Alex.) responderet; Ita: etiamsi interrogares, num interfecisset hominem, cons. 33. vol. 3.

o) d. L. iubemus. & DD. ibidem.

preſumption of deceite in the one, as of defecte of meaning of making of a teſtament in the o-
8 ther[p]. And † this is true eſpeciallie, when there is an other former teſtament, for that is not to be reuoked by a ſecond teſtament made at the interrogation of an other, in maner aforeſaid[q].
9 But † if the perſon which maketh the motion be not anie waie ſuſpected, and it dooth appeare withall by ſome coniectures, that the ſick perſon had a deſire to make his will, as if the ſicke perſon ſend for his freend, who being co-
5 men vnto him, asketh him whether hee make this or that man his executor, which otherwiſe were to haue the adminiſtration of his goodes if he died inteſtate; to whō the ſicke perſon anſwereth; yea, or I doe make him my executor: In this caſe this teſtament is good[r], albeit it were in preiudice of an other teſtament made
10 before[s]. But † what if it doe not appeare by any coniecture, that the teſtator had a meaning to make his teſtament, and yet no ſuſpition can be conceiued againſt the perſon which demaundeth the queſtion, whether is the teſtament good, if the teſtator doo onelie anſwer, yea? I ſuppoſe, that without ſome coniecture of the teſtators meaning, it is not ſufficient[t].

11 The fourth caſe is, when the † ſicke mans kinsfolkes, or ſome other perſons doo cauſe a teſtament to be written after their inditinge, (the ſicke man as yet no knowinge thereof) and then afterwardes the ſame being read vnto him, and he being demaunded, whether the ſame ſhall ſtande for his teſtament, aunſwereth,

p) Mantic. de coniect. vlt. vol. lib. 2. tit. 6. n. 9. Couar. in c. cum tibi. de teſta. ext n. 4. Peckī. d. c. 17. n. 2.

q) Socin. Iun. d. conſil. 183. n. 34. Zaſ. d. conſ. 3. n. 41. Molineus in addic. ad conſil. Decij. 489. vbi non dubitat affirmare, Decium & alios contrarium conſul: peſſimè conſuluiſſe.

r) Zaſ. d. conſil. 3. n. 37. Socin Iun. d. conſil. 183 n. 31. Couar. in d. c. cùm tibi. n. 4. Peckius. d. c. 17. n. 5.

s) Dec. d. conſil. 489. Socin. Iun. conſil. 144. vol. 2. n. 44. 45.

t) Mantic. de coniect. vlt. vol. lib. 2. tit. 6. n. 9. Socin. Iun. conſil. 183. vol. 2. n. 6. 37.

reth, yea, and shortlie after dieth: in this case the testament is not good [v], vnlesse the testator had first vttered his meaning to the writer or inditer therof [x], or had requested them to write his will [y], or vnlesse the testator being of good minde & memorie, had by plaine and expresse wordes, or other apparant coniectures, confirmed the same, then onelie by answering yea [z].

But what if a will bee brought to the sicke man, which beeing reade ouer in his hearing, and hee demaunded whether the same shall stand for his last will and testament; answereth yea: and it doeth not appeare whether the same was written and prepared by the direction of the sicke man, or else of his kinsfolkes and frindes, whether is it to be presumed, to haue been prepared by his direction or by theirs? It seemeth by the sicke man, in fauour of the testament [a]; but when it appeareth indeede to haue beene made readie by others, then albeit the testator beeing interrogated doe answere as before, it is presumed that the question was made by the suggestion or of the executor [b], and so the testament is not good, as is aforesaid.

v) Mantic. de coniect. vlt. vol. lib. 2. tit. 6. n. 10. qui dicit hanc op. esse magis com. Couar. in d. c. cùm tibi. n. 4.

x) Sichard. in L. iubemus. C. de testa. n. 7. Gabr. lib. 4. com. concluſ. tit. de testa. concl 2. n. 13. 17.

y) Gabriel. vbi supr.

z) Mantic. de coniect. vlt. vol. lib. 2. tit. 6. in fin.

a) Alex. consil. 33. vol. 3. Gabr. lib. 4. tit. de testa. concl. 2. n. 15.

b) Mantic. de coniect. vlt. vol. lib. 2. tit. 6. n. 10.

Of Eccleſiaſticall perſons.

1 *Two ſorts of Eccleſiaſticall perſons, regular, and ſecular.*
2 *Who are meant by regular perſons.*
3 *Religious perſons compared to bond-men.*
4 *Religious perſons compared to dead men.*

5 *Who*

5 *Who be here meant by ſecular clerkes.*
6 *Eccleſiaſticall perſons are not ſimplie prohibited to make their teſtamentes.*
7 *Eccleſiaſticall perſons may make their teſtamentes of all goods, which they haue not in right of their church.*
8 *Eccleſiaſticall perſons can not make their teſtamentes of thinges immoueable, which they poſſeſſe in right of their church.*
9 *An Eccleſiaſticall perſon may make his teſtamente of the glebe by him ſowen.*
10 *Whether an eccleſiaſticall perſon may make his teſtament of the fruites not receiued.*
11 *All fruits which happen during the vacation, are due to the next incumbent.*
12 *Whether an eccleſiaſticall perſon may make his teſtament of all moueable goodes, which hee hath in right of his church.*
13 *Some caſes wherein eccleſiaſticall perſons cannot diſpoſe of their goods.*

§.xxvij.

1 OF † Eccleſiaſticall perſons there be
2 two ſortes, the one *Regular*, the other *Secular*[a]. By *Regular* † I doo vnderſtand Monkes, friers, and other religious perſons[b], whereof becauſe we haue none this day inthe church of England, I ſhall not neede to enter into any diſcourſe concerning them: Onelie this by the waie, that theſe religious perſons in reſpecte of their canonicall obeiſaunce, vowed vnto their

a) c.duo.12.q.1.gloſſ. in Rub.de regularibus extr.
b) c.2.de teſta.extr.

Abbots and prelates, are in lawe compared vnto bond-men [c], and † in respect of their vowe of 4
their perpetuall pouertie, or renouncing the world, they are compared vnto dead men [d], & in these respectes they could not make a testament [e]. But if a religious man had made a testament before his enteraunce into that profession, then was the same to haue beene prooued and executed, as if hee had beene naturallie dead [f]: and if he had made no testament, when he had entred into religion, then the ordinarie might haue cõmitted the administration of his goods, as of one that had died intestate [g]. But it was and is otherwise with secular clerkes, who albeit they be sometimes comprehended vnder the name of religious persons [h], yet the law disposeth otherwise concerning their testamentes, then of the testamentes of religious persons [i].

By † *Secular* clerkes I vnderstande Archbi- 5
shops, Bishops, Deanes, Archdeacons, Prebendaries, Parsons, Vicars, and other ecclesiasticall ministers or cleargie men [k]. These persons † are 6
in some respectes prohibited to make their testaments, but they are not simplie forbidden [l]. Wherefore that we may the better know when they may make a testament, & when they may not; we are first to consider whether the things whereof they make their testamentes, doe belong vnto them in anie other respect then in the right of the church, or of their ecclesiastical liuing [m].

For † of other thinges then such as are 7
gotten

c) Specul. de statu. Monach.
d) Litleton. tit. villenage. circa medium.
e) Quod si quis scire cupiat, an, & quatenus Monachus sit testabilis, legat Iul. Clar §. testm. q 28, 29, 30. Michael. Graff. §. testm. q. 34. & Ferdinan. Vasq. de succeff progreff. lib. 1. § j.
f) Litleton. vbi supr.
g) Ibidem.
h) Panor. in Rub. de regular. extr.
i) vt statim sequitur hoc §.
k) Michael Graff. Thesaur. com. op. §. testm. q. 34. Iul. Clar. §. testm. q. 27.
l) c. 1. c. cũ in officijs. c. relatum. el. 2. c requisisti. de testa. extr. Couar. in d. c. 1.
m) Ita distinguitur in d. c. relatum. el. 2.

gotten by right of the church, whether the ſame be lefte vnto them by their parentes, or giuen by ſome friend, or whether they got the ſame by their owne induſtrie, either by preaching of the goſpell or by teaching of ſchollers, or other labour[n], of ſuch thinges they may freelie diſpoſe and make their teſtamentes, aſwell as laie perſons[o], although the ſame be giuen, or gotten after they be entred into the miniſterie, and alſo after they haue obteined ſuch ſpirituall promotion[p].

If any thing doe appertaine vnto them in right of their church, then wee are to conſider,
8 whether the ſame be *moueable* or not. For of † *immoueable* thinges, as of houſes, or of demeanes, or of glebe, and ſuch like, eccleſiaſticall perſons can not diſpoſe by their teſtaments[q], nor of the trees, or fruites, growing vpon the ſame
9 demeanes, or glebe[r]: Sauing † whether the incumbent before his death, hath cauſed anie of his gleebe landes to be manured and ſowen, at his proper coſtes and charges, with anie corne or graine, for in this caſe ſuch incũbent, maie make and declare his teſtament of all the profits of the corne, growing vpon the ſame glebe landes, ſo manured and ſowen[s]. And although
10 † heretofore, as well by generall cuſtome of this realme[t], as by ſpeciall conſtitution[v], it was lawfull for parſons and vicars, after the feaſt of the annũciatiõ of the bleſſed virgin[x], & in ſome places after the feaſt of S. Marke[y], to make their teſtaments of the fruites of their liuings, albeit not as yet receiued, but paiable that yeere or

n) Panor. in d.c. relatũ. el.2.de teſta.extr.flores vlt.vol.part.1.fol.4.

o) d.c.1.de teſta.extr.& Couar.ibidem.Graſſ.§. teſtm.q.34.Perkins.tit. deuiſes.c.8.in prin.

p) Cyn & alij in Authẽ. licentiam.C.de Epiſcopis & Cler.Graſſ.d.§. teſtm.q.34.n.2.

q) L.iubemus. C.de ſacroſan eccle.c. cùm in officijs.c.relatum. el.2. de teſtam.extr.Perkins tit.deuiſes.in princ.

r) Perkins vbi ſupr. Epiſtola cuiuſdam libri qui inſcribitur, *An anſwere to an Abſtract, &c.*

s) Stat.H.8.an.28.c.11.

t) Lindw.in c.nullus rector.de conſuetud. lib.1.prouincial.conſtituc.Cant.

v) c.cùm inter rectores tit.de conſuetud.lib.1. prouincial. conſtituc. Ebor.

x) d.c.nullus.

y) d.c. cùm inter rectores.lib.1.prouincial. conſtit.Eborac.

harueſt following. Neuertheleſſe by the ſtatuts of this realme, ſuch cuſtome and conſtitution is taken awaie, by which ſtatut[z] † al fruits, tithes oblations, and other emolumentes whatſoeuer belonging to anie Archdeaconrie, denary, prebend, parſonage, vicarige, hoſpitall, wardenſhip, prouoſt-ſhip, or other ſpirituall promotion, benefice, dignitie or office, (chaunteries onelie excepted) growing, riſing or cõming, during the time of the vacation of the ſame ſpirituall promotion, belonge to the next incumbent, and to his executors towards the paiment of the firſt fruites.

z) d. Stat. H. 8. an 28. c. 11.

Of goods † *moueable* which an eccleſiaſticall 12
perſon poſſeſſeth, albeit the ſame were gotten in right of the church, or by meanes of his eccleſiaſticall liuing, he may make his teſtament, like as of anie other his temporal goods[a], whether ſuch eccleſiaſtical perſon be biſhop, deane, archdeacon, prebendarie, parſon, or vicar, or otherwiſe tearmed or intituled (certaine caſes onelie excepted)[b] viz. † of goodes which a bi- 13
ſhop hath common with a deane or chapiter[c], or which a deane or chapiter haue common to themſelues[d], or which a maiſter or brethren of an hoſpitall or colledge haue alſo amongeſt themſelues, in the right of their houſe[e], or of goods which are dedicated to the ſeruice of God, as ornamentes of the church[f], or of the eccleſiaſticall rightes, not receiued or not due, nor paiable in the time of the incumbencie of the teſtator, but reſerued to the next incumbent[g]: In which caſes it is not lawfull for eccleſiaſticall

a) Lindw. in d. c. nullus. verb. legata. Doct. & Stud. lib. 2. c. 39, 40. quod verum quidem eſt, iure ſeu conſuetudine huius regni Angliæ: ſed attento iure cano, non procedit indiſtinctè. Abb. in d. c. relatum el. 2. de teſta. extra.

b) Iul. Clar. §. teſtm. q. 27. Graſſ. §. teſtm q. 34.

c) c. relatum. el. 2. de teſta. extr. Perkins. tit. deuiſes. in princ. Doct. & Stud. lib. 2. c 39.

d) Fitzherb. Abridg. tit. teſtm n. 1.

e) Perkins. Doct. & Stu. vbi ſupra.

f) Ætiologia, eſt quia huiuſmodi rerum nullum eſt commercium. §. nullius. Inſti. de rerum diuiſ.

g) d. Stat. H. 8. an. 28. c. 11.

cleſiaſtical perſons to make their teſtaments of ſuch goods; which caſes excepted, it is lawfull for an eccleſiaſticall perſon to declare his will [h], either of the goods themſelues, (if the remaine and are extant) or of the mony taken for the ſame being ſolde or alienated [i].

h) Exceptio enim firmat regulam in non exceptis. Dec. in L. 1. de reg. iur. ff.

i) Iſtud verum iure quo nos vtimur. artic. cler. c. 1. Doct. & Stud. lib. 2. c. 39. ſecùs iure can. Panor. in d. c. relatum, el. 2. n. 3. Graſſ. d. §. teſtm. q 34. Iul. Clar. §. teſtm. q. 27.

Of Kinges.

1 *Examples borrowed out of the olde teſtament, whereby it maie ſeeme lawfull for kinges to giue awaie their kingdomes.*
2 *Certaine humane reaſons, tending to the ſame purpoſe.*
3 *Other examples taken out of prophane hiſtories of Kinges, which haue diſpoſed of their kingdomes by their teſtamentes.*
4 *By the ciuil and cannon lawes, a King can not giue awaie his kingdome.*
5 *Whether by the lawes of this realme, a King maie giue awaie his kingdome.*
6 *An vncertaine concluſion.*

§. xxviii.

IT may ſeeme lawful for a king by his teſtament, to make his heire whomſoeuer he ſhall thinke good, or to leaue his kingdome to whome hee will, both by gods lawe and mans lawe.

1 By gods law, becauſe † *Moſes* a man, to whom God did ſpeake as it were face to face, lefte the prin-

principallitie or gouernement of the Israelites to *Iosua* [a], being of the tribe of *Ephraim* [b], and not to anie of his owne tribe, which was the tribe of *Leui* [c]. King *Dauid* likewise, a man after gods owne heart did bestowe the kingdome on *Salomon* [d], hauing the same time an elder son, namelie, *Adoniah* [e]: the same *Salomon*, the wisest man that euer was or shalbe [f], whiles he raigned as king did giue vnto *Hyram* king of *Tyrus*, twentie citties of the kingdome of *Israell*, situate in the lande of *Galile* [g]. The holy Patriarke *Iacob* also, euen he that wrastled with an angell [h], depriued his eldest sonne *Ruben* of his birth right, and gaue the same to the sonnes of *Ioseph* [i].

By mans lawe, becausé † the voice and will of a Prince hath the force of a lawe [k]; becausé also a king is said to be a mortal God [l]; and therfore what he commaundeth ought to be obeyed without resistaunce [m], if it doe not repugne the lawe of God immortall [n]. To be shorte, if a king might not dispose of his owne kingdome at his owne pleasure, then his state were not so good as the state of his subiect [o], for the meanest subiect may freelie dispose of his owne [p]. Besides which vrgent reasons, whereby appeareth the roote and life of this humaine lawe, there bee sundrie pregnant examples, which as branches springing from that liuelie roote, haue in sundrie ages and countries brought foorth faire and goodlie fruite; whereby the force and efficacie of that lawe hath beene made manifest to all the world; let these fewe suffice for a taste. It is recorded that *Attalus* a king in *Asia* the lesse, did

2

a) Deutero. c. vlt. vers. 9. 10.
b) Gloss. in c. Moses. 8. q. 1.
c) Phil. Franc. in Rub. de testa. lib. 6. post gloss in d. c. Moses.
d) Lib. 1. reg c. 1. versic. 28, 29, 30. cum sequent.
e) eod. c. versic 41. cum sequen.
f) 1. reg. c. 3. vers. 12.
g) 1. reg. c. 9. vers. 11.
h) Genes. c. 32. vers. 24. &c.
i) Genes. c. 49. Paralip. c. 5. in princ.
k) §. sed & quod. Instit. de iur. na. gen. & ciuil.
l) Bald in §. præterea. de prohib. alienac. feud. per feder. n. 14. psal. 82. vers. 6.
m) Bald. in auth. hoc ampli°. C. de fideicom. n. 10. quem velim videas.
n) Act. Apost. c. 4. vers. 19. & c. 5. vers. 29.
o) Oldrad. consil. 94 in fin.
p) Supr. ead. part. in prin.

did in his teſtament inſtitute the *Romane* people his heire, who by vertue of that teſtament did enioie the kingdome[q]: likewiſe that *Alexander* king of *Ægypt*, did bequeath vnto the ſame *Romaine* people the kingdomes of *Alexandria* and *Ægypt*[r], *Ptolemæus* the king of *Ægypt* gaue away the kingdome of the *Cyrens*[s], *Vnguinus* was king of the *Gothes* by the appointment of *Haldanus*[t]: To come neerer (I meane in reſpecte of place not of time) we maie reade how *Praſutagus*, one of the kinges of this realme of England, a little after the death of Chriſt, did make the Emperour *Nero* his heire[v]: And diuers other kinges haue doone the like[x]. So that it is neither newe or ſtraunge, that kinges haue by their teſtamentes giuen away their kingdomes from thoſe, who otherwiſe ſhould haue enioyed the ſame.

4 Notwithſtanding † aſwell by the ciuill law[y] as by the cannon lawe[z], (with the which lawes the lawes of this our realme of England, doe in this point ſeeme to ioyne hands[a]:) It is vnlawfull for a king to giue awaie his kingdome from his lawfull heires, for the confirmation whereof diuers writers vſe diuers reaſons[b].

5 But † amongeſt all their reaſons, I ſee no reaſon to induce me to aduenture anie further in-

q) Florus lib. 2. Hottoman. illuſtr. quæſt. c. 1.

r) Cicero Ora. 1. pro lege agrar. aliàs lib. 2. c. 15.

s) Hottoman. d. c. 1.

t) Eodem loci.

v) Cornel. Tacitus. lib. 14. Camden. fol. 290. aliàs fol. 355.

x) Quorum meminit Gentilis diſp. 2. fol. 45.

y) Bar. & Angel. in L. prohibere. §. planè. ff. quod vi aut clam. Iaſ. in L. debitorum C. de pactis. Bald. in proem de feudis. n. 32. Vaſq. de ſucceſ. crea §. 26. lim. 3.

z) Innocen. Cardinal. Imol. Panor. Io. de Anan. & alij. in c. intellecto. de iureiur. extr. Felin in c. dilecti de maior. & ob. extr.

a) Fitzherb. Abridg. tit. deuiſe. n. 5. tit. execut. n. 108. hiſce verbis: L'opinion de pluis Iuſtices & Doctors del cannon & ciuil ley, aſſembles in le Eſchequer chambre, quant Roy Henry quart moruſt, fuit que il puit faier teſtm & legacy des biens que il auer, mez dez biens de Royalme, ceſt aſſauoyer ancient, Corone & Iuells il ne puit. Eodem

tendunt quæ à Guiliel. Lamberto, viro doctiſſimo, trãſcripta ſunt, ſub hac verborũ ſerie: Debet verò de iure rex omnes terras & honores, omnes dignitates, & iura, & libertates Coronæ regni huius, in integrum cum omni integritate, & ſine diminutione ſeruare, & defẽdere, &c. lib. de priſcis Angl. legib. tit. de reg. offic. fol. 130. b) De hac q. conſulas Frãc. Hotto. iuriſconſultorũ omniũ, quos iſta peperit ætas, celeberrimũ. lib. 1. illuſtr. quæſt. c. 1.

to the examination of this deepe and dangerous queſtion, much leſſe to proceede to the concluſion; not onelie becauſe the ſame beeing ſo high an obiect, dooth farre exceede the ſlender capacitie of a meane ſubiecte: but alſo for that this princelie controuerſie, as it hath ſeldome receiued ordinarie triall heretofore; ſo hereafter if the caſe were to be argued in verie deede, verie likelie it is to bee vrged with more violent arguments and ſharpe ſyllogiſmes, then by the vnbloodie blowes of bare words, or the weake weapons of inſtrumentes made of paper and parchment: And on the other ſide to bee anſwered with flatte denials of greater force, and diſtinctions of greater efficacie, then can proceede from anie legall or logicall engine; and in the end to be decided and ruled by the dead ſtroke of vnciuill and martial cannons, rather then by anie rule of the ciuill or cannon lawe.

Videant quorum intereſt.

THE THIRD PART OF THIS TESTAMENTARIE TREATISE:

WHEREIN IS EXAMINED *what thinges may be deuiſed by will.*

The Paragraphes, or Chapters of the third parte.

WHat thinges are examined in this third part §.1.

Landes, tenementes and hereditamentes, can not paſſe by will but in certaine caſes §.2.

Certaine caſes approoued by cuſtome, wherein it is lawfull to bequeath, or deuiſe landes, tenementes and hereditamentes. §.3.

Certain caſes auctorized by the ſtatuts of this realme, whereby it is lawfull to deuiſe landes, tenementes, and hereditamentes §.4.

Of the deuiſe of goods and cattelles §.5.

Diuers kindes of goods and cattelles not deuiſable by will §.6.

Of the aſsigning of tutors, and diſpoſing of childrens portions §.7.

Of committing the tuition of children, and cuſtodie of their portions, within the prouince of Yorke §.8.

Who

Who may appoint a tutor §.9.
Who may be appointed tutor §.10.
To whom a tutor may be appointed §.11.
Of the manner of appointing tutors §.12.
Of the office and auctoritie of a tutor §.13.
By what meanes the tutor-ſhip is ended §.14.
What quantitie of landes may be deuiſed §.15.
What quantitie of goods or cattelles may be deuiſed §.16.
If the teſtator doe in fact bequeath more then he may by lawe, which legacie is to be preferred, or what other courſe is to be followed §.17.

VVHAT

VVHAT THINGES ARE EXAMINED IN THE THIRD PART.

The third part.

1 *The thirde principall parte deuided into two members.*
2 *The firſt member three-foulde.*

§. j.

IN the third parte of this Teſtamentarie treatiſe, there is to bee ſhewed, firſte *what thinges*, & then *how much* the teſtator maie diſpoſe, or deuiſe by his teſtament.

Concerning the former of theſe, it ſhall not be a miſſe to ſpeake firſt of the bequeathing or deuiſing of *landes, tenementes, and hereditaments*[a].

Secondlie of the bequeathing or deuiſing

a) Infr. ead part. §§. 2, 3, 4.

b)Infr.ead.par. §§.5,6.
c)Infr.ead.part §§.7, 8,&c.

of *goods and cattelles* [b], and thirdlie of the *committing of the tuition of children*, and custodie of their portions and rights, during their minorities [c].

Of the deuise of landes.

1 *The rule of the deuise of landes is negatiue.*
2 *The exceptions of this rule are of two sortes.*

§.ij.

TRue it is, that this matter of the deuise of landes, tenementes and hereditamentes, which in this realme of Englande with all questions incident thereunto, is to be determined according to the lawes temporall of this realme; and is not subiecte to the rules and decisions of the lawes ciuill or ecclesiasticall: lest therefore whilest I would seeme a meere professor of the ciuill lawe, I might seeme altogether to neglecte both lawe and ciuilitie, by thrusting my sickle into an others harueste, and setting my foote in an others possessions without licence first obtained: for the anoiding of this offence, before I go any further, I am to craue this fauour (learned professors and serious students of the laws temporal of this realm,) that for as much as this your fielde, wherein groweth all these questions concerning the deuise of landes, dooth lie so iust betwixt me and those other groundes, wherein the marke whereat I aime, is placed, and

and wherein the fruite which I would gladlie vtter is planted: ſo that I can not (as nowe my iourney lieth) haue readie acceſſe vnto the one but through the other: It would therefore pleaſe you giue mee a little leaue to walke through a corner of your large dominions, vnto thoſe foreſaid places, more proper to them of mine own profeſſiō. (Your territories I confeſſe are verie fertile, and ful of hidden treaſure, the fruite alſo of that ſoile, I meane the golden caſes much like the golden fleece of *Colchos*: the growing very pleaſant & profitable: Howbeit you neede not be afraid of any preiudice, for neither wil I diſturbe your quiet poſſeſſion with any long abode: neither cā I if I wold, cōueigh away the riches you ſhould reape, by diſcioſing of the myſteries of your gaineful arte to me vnknown, vnles I would ſeeme to be more bold then blinde baiarde, more arrogant then the ignoraunt Cobler, who for his ſaucineſſe receiued this admonition: *Ne ſutor vltra crepidam.*) And further that as a poore paſſenger, I maie bee allowed to take a taſte of thoſe thinges which you haue ſet abroache to all the world, and which by your ſundrie bookes you haue made common to all trauellers, the rather for that I am prepared in ſome ſorte to requite the ſame. This onelie I deſire, and this I hope you will not denie, to the purpoſe therefore.

Touching the bequeſt or deuiſe of landes, tenementes and hereditamentes, this appeareth to be a true poſition, and ground agreeable to the ciuill lawe [a], and alſo the laws of this realme [b],

a) c. imperialis. de prohib. feud. alien. lib. 2. Feud. Bald. in c. 1. de ſucceſſ. feud.

realme[b], that landes, tenementes or hereditamentes, can not be disposed or deuised by will, but in certaine cases, of which some are approued by force of certaine *customes*[c], within this realme; and some by force of certaine *statutes*[d].

b) Stat. H 8. an. 27. c. 10. in princ. Doct. & Stud. lib. 1. c. 8. Perkins. tit. deuise. 102.
c) Infr. §. prox.
d) Infr. cad. par. §. 4.

Certaine cases approoued by custome, wherein it is lawfull to deuise landes, tenementes, or hereditaments.

1 *Gauelkinde landes may be deuised by will.*
2 *The cause wherefore the custome of Gauelkinde did continue.*
3 *Burgage lande deuiseable by will.*
4 *To whom and after what manner Burgage landes be deuiseable.*
5 *Whether anie other person maie deuise Burgage landes but a citizen.*
6 *Burgage tenure a kinde of tenure in Soccage.*
7 *Whether liuerie or seasin bee needefull, where burgage land is deuised.*
8 *Whether the Iointenaunt may bequeath his part of Burgage land otherwise deuiseable.*
9 *Of landes deuised to certaine vses.*
10 *The custome of deuising landes to feoffes reformed.*
11 *The causes of this reformation.*
12 *The statute or acte of reformation.*

§. iii.

THe first case wherein by custome of this realme of England, it is lawfull for a man by his laste will or testament, to deuise or bequeath landes, tene-

tenements or hereditamẽts, is this, namely, whẽ lands, tenements or hereditaments, are holden
1 in Gauel-kind: for such † landes, tenements or hereditaments by ancient custome, maie be giuen or deuised by wil [a], (the same otherwise being duelie made.) For † after that *William* duke
2 of *Normandie*, had inuaded and conquered all England, Kent onelie excepted, at last also the kentish-men yeelded, but vpon condition that they might enioy their auncient customes of Gauelkind, which was graunted vnto them, & since hath continued [b]: amongest which customes, being verie large and benificiall, this is one; that they which holde landes in Gauelkinde, may giue and sell the same, without licence asked of their lordes: sauing vnto the lordes, the rentes and seruices due out of the same tenementes [c].

3 The † second cause is, when the lands or tenementes be holden in Burgage tenure [d]. For it is the custome of diuers Cities and Borroughes of this land, (as in London, Yorke, Oxford, &c.) that such persons as are seased of landes, tenementes, or hereditamentes, lyinge and being in such cities or boroughes [e], and hold the same in burgage tenure, maie by their testamentes or last willes, giue or bequeath the same to whom they will [e], to holde in fee simple, or in fee taile, or for life or yeeres, or otherwise, and such bequest or deuise is good [f], the will being lawfullie made, and prooued before the ordinarie, as touching the goodes and cattelles bequeathed in the same, and enrowled

a) Dyer. fol. 155 verb. deuise. Termes of law. verb. Grauelkind & ita sæpissimè accepi à nonnullis huius regni iurisperitis.

b) Lambert. perambulation of Kent. fol. 23.

c) Termes of law. vbi supr. Lambert. vbi supr. fol. 416.

d) Fitzherb. Nat. Bre. ex graui querela. in prin. Doct. & Stud. lib. 1. c. 7. & 10.

e) Brook. Abridg. tit. deuise. n. 22. 51. Fitzher in d. Br. ex graui querela. Doct. & Stud. d. c. 7. & 10. Lindw. in c. statut. de testam. lib. 3. prouincial. constituc. Cant. verb. de consuetudine. & verb. laicalis feodi. eod ct.

f) Fitzherb. in d. Breui ex graui querela.

before the maior of the said citie or borough[g]. Howbeit, it is not alwaies necessarie, that the testament be proued before the ordinary, or inrolled, wherein landes onelie, and no goodes and cattelles are bequeathed[h]: For in some places by the custome there vsed, the deuisee maie enter to the landes deuised of his owne auctoritie, without any probation or inrolment præcedent, and in other places hee is to bee put in seasin or possession by the Balife[i]. And it seemeth not to be needeful, to the validitie of the deuise in this case, that the testator should be a citizen, or burgesse of that citie or boroughe, where the landes or tenementes deuised doo lie: but it is sufficient, if the landes and tenementes be holden in burgage[k]: For that not he onelie is said to holde in burgage, who is a citizen or burgesse of the place where the lands or tenementes be, and holdeth of the kinge, or other lorde landes or tenementes lying in the citie or borough, yeelding therfore to his said lord a certaine yeerelie rent: but he also that is no citizen or burgesse, which holdeth of anie lord landes or tenementes in burgage, yeelding vnto him a certaine rente by the yeere[l], which tenor in burgage is but a kind of tenure in soccage[m]. Howbeit there is this difference betwixt citizens, burgesses and freemen, and those which be not citizens, burgesses or freemen, that is to saie, citizens, burgesses and freemen, maie bequeath their burgage landes to Mortmain, which others can not doe[n]. And in some borough by the custome thereof, a man may

g) Fitzher. in d. Bre. ex graui querela.

h) Brook Abridg. tit. deuise. n. 43.

i) Brook id. tit. deuise. n. 43. principall grounds. tit. burgage. fol. 43.

k) Brook tit. deuise. n. 22

l) Old. tenures. verb. burgage.

m) Litleton. tit. burgage. in princ.

n) Brook Abridg. tit. custome. n. 7. 38. 41. tit. deuise. n. 22. 28. Doct. & Stud. lib. 1. c. 10.

may deuiſe by his teſtament lawfullie made, his landes and tenementes, which hee hath in fee-ſimple within the ſame borough at the time of his death, and by force thereof the deuiſee, after the death of the teſtator, maie enter into the tenementes to him deuiſed, to haue and to holde to him after the forme and effect of the deuiſe, without anie libertie of ſeaſin thereof to be made vnto him[o]. But if there be two iointe tenauntes in fee-ſimple, within one borough, where the landes and tenementes within the ſame be deuiſable by teſtament, if one of the ſaid iointe tenauntes deuiſe that which to him belongeth, by teſtament and die, this deuiſe or legacie is voide[p]: The reaſon is, for that no deuiſe can take effect till after the death of the teſtator, who did bequeath and deuiſe the ſame, but by his death all the lande dooth incontinentlie by the lawe of this realme, come to the ſuruiuor, who neither claimeth nor hath anie thing by deuiſe but of his owne right by the ſuruiuer according to the courſe of the lawe of this lande, and for this cauſe ſuch deuiſe is voide[q].

o) Litleton. tit. burgage.

p) Principall grounds. fol. 20. b.

q) Principall grounds. fol. 20. b.

An other caſe there was alſo ſome-times vſed and practiſed, of deuiſing lands, tenements, and hereditamentes by willes to certaine vſes, intentes and truſtes: which willes or teſtamentes of landes, tenementes and hereditamentes in feoffees handes were for the time accompted and taken for good[r].

But this cuſtome was reformed in manie things, for diuers good conſiderations: name-

r) Stat. H. 8. an. 27. c. 10.

lie, because by the common law of this realme, lands, tenements & hereditaments, be not deuisable by testament: and also for that such deuises were not onelie hurtfull to the heire of the testator, beeing manie times thereby disinherited, but also for that diuers other inconueniences did by reason thereof insue: as that the lordes lost their wardes, mariages, reliefes, harriots, escheates, aids, *Pur faire fitz chiualer & pur file marier*. Furthermore by occasions of suche willes, and other conueiaunces, to secrete intentes, vses and trustes, men could not be certainelie assured, of anie landes by them purchased, nor knew not against whom they should vse their actions & executions, for their rights and titles. Besides this men married lost their tenãces by the curtesie, women their dowries; finally the prince himselfe lost the profits of the landes of persons attainted: For reformation whereof a statute was made in the time of King *Henrie* the eight, and enacted as followeth [s].

s) d. Stat. H. 8. an. 27. c. 10.

„ That is to say, that where anie person or per-
„ sons, stand or be seized, or at anie time hereafter
„ shal happen to be seized of and in anie honors,
„ castels, mannors, landes, tenementes, rentes,
„ seruices, reuersions, remainders, or other here-
„ ditamentes, to the vse, confidence or trust of a-
„ nie other person or persons, or of anie body po-
„ litike, by reason of anie bargaine, saile, or feof-
„ ment, fine, recouery, couenant, contract, agree-
„ ment, will, or otherwise, by anie maner meanes
„ whatsoeuer it be, that in euerie such case, all &
„ euerie such persõ & persons, & bodies politike,
„ that haue or hereafter shall haue anie such vse,

con-

confidence,or truſt,in fee ſimple, fee taile, for „
terme of life or of yeeres,or otherwiſe: or anie „
vſe,confidence, or truſt in remainder or reuer- „
ter, ſhall from hence-foorth ſtand and bee ſei- „
zed,deemed,and adiudged in lawfull ſeizon,e- „
ſtate,and poſſeſſion of and in the ſame honors, „
caſtels,manors,lands,tenements,rentes, ſerui- „
ces,reuerſions,remainders,and hereditaments „
with their appurtenances to all intents, con- „
ſtructions,and purpoſes in the lawe, of and in „
ſuch like eſtates as they had or ſhall haue,in vſe „
truſt,or confidence,of or in the ſame. And that „
the eſtate,title,right,and poſſeſſion,that was in „
ſuch perſon,or perſons, that were or hereafter „
ſhall be ſeized,of anie landes,tenements,or he- „
reditaments,to the vſe,confidence, or truſt, of „
anie ſuch perſon or perſons, or of anie bodie „
politike, bee from hence-foorth cleerelie dee- „
med and adiudged to be in him or them, that „
haue, or hereafter ſhall haue, ſuch vſe, confi- „
dence,or truſt,after ſuch qualitie,maner,forme „
and condition,as they had before,in or to the „
vſe,confidence,or truſt,that was in them. „

And bee it further enacted by the authoritie „
aforeſaid, that where diuers and many perſons „
be or hereafter ſhall happen to be, iointlie ſei- „
zed of and in anie landes,tenements,rents, re- „
uerſions,remainders, or other hereditaments, „
to the vſe,confidence,or truſt, of anie of them „
that bee ſo iointlie ſeized, that in euerie ſuch „
caſe,that thoſe perſon or perſons, which haue, „
or hereafter ſhall haue, any ſuch vſes, confi- „
dence,or truſt,in anie ſuch landes, tenements, „

„ rents,reuerſions,remainders,or hereditaments
„ ſhall from hence foorth haue and bee deemed
„ & adiudged to haue,only to him or them,that
„ haue, or hereafter ſhall haue, ſuch vſe , confi-
„ dence,or truſt, ſuch eſtate, poſſeſſion and ſei-
„ zon,of and in the ſame lands,tenements,rents,
„ reuerſions,remainders,or other hereditaments
„ in like nature, maner,forme, condition , and
„ courſe,as he or they had before in the vſe, con-
„ fidence,or truſt of the ſame landes,tenements,
„ or hereditaments: ſauing and reſeruing to all &
„ ſingular perſons,and bodies politike,their heirs
„ and ſucceſſors, other than thoſe perſon or per-
„ ſons,which be ſeized, or hereafter ſhall be ſei-
„ zed,of anie landes , tenementes, or hereditа-
„ ments,to anie vſe, confidence or truſt, all ſuch
„ right,title,entree,intereſt,poſſeſſion,rents, and
„ action , as they or anie of them had or might
„ haue had,before the making of this acte.
„ And alſo ſauing to all and ſinguler thoſe per-
„ ſons,and to their heires , which be or hereafter
„ ſhall he ſeized,to anie vſe,all ſuch former right,
„ title,entree,intereſt,poſſeſſion, rents,cuſtoms,
„ ſeruices, and action, as they or anie of them
„ might haue had to his or their own proper vſe,
„ in or to any manors,lands,tenements,rents, or
„ hereditaments,wherof they be or hereafter ſhal
„ be ſeized to anie other vſe, as if this preſent act
„ had neuer beene had or made : any thing con-
„ teined in this acte to the contrarie not with-
„ ſtanding.
„ And where alſo diuers perſons ſtand and be
„ ſeized of and in any lands,tenements, or here-
dita-

ditaments, in fee ſimple, or otherwiſe, to the vſe „
or intente that ſome other perſon or perſons, „
ſhall haue and perceiue yeerely to them, and to „
his or their heires, one annuall rent, of tenne „
pounds, or more, or leſſe, out of the ſame lands „
and tenements, and ſome other perſon, one o- „
ther annuall rent to him and his aſſignes, for „
terme of life, or yeeres, or for ſome other ſpeci- „
all time, according to ſuch intent and vſe, as „
hath bin heretofore declared, limited, & made „
thereof. Be it therefore enacted by the authori- „
tie aforeſaid, that in euery ſuch caſe, the ſame „
perſons, their heirs, and aſſignes, that haue ſuch „
vſe and intereſt, to haue and perceiue any ſuch „
annuall rents, out of any lands, tenements, or „
hereditaments, that they and euery of them, „
their heires, and aſſignes, be adiudged and dee- „
med to be in poſſeſſion and ſeizon of the ſame „
rent, of and in ſuch like eſtate, as they had in „
the title, intereſt, or vſe of the ſaid rent or profit, „
and as if a ſufficient grant, or other lawful con- „
ueiance, had bin made & executed to them, by „
ſuch as were or ſhalbe ſeized to the vſe or entēt „
of any ſuch rent, to be had, made, or paied ac- „
cording to the very truſt & intent therof. And „
that al & euery ſuch perſon or perſons, as haue, „
or heereafter ſhall haue, any title, vſe, and in- „
tereſt, in or to any ſuch rent or profit, ſhall law- „
fully diſtreine for non paiment of the ſaid rent, „
and in their owne names make aduouries, or „
by their balifs or ſeruants, make cognizances „
and iuſtifications, and haue all other ſutes, en- „
tries, and remedies for ſuch rents, as if the ſame „

rents

„ rents had bin actually and really graunted to
„ them, with ſufficient clauſes of diſtreſſe, reen-
„ tree, or otherwiſe, according to ſuch conditi-
„ ons, paines, or other things, limited and ap-
„ pointed vpon the truſt and intent, for paiment
„ of ſuretie of ſuch rent.

„ And be it further enacted by the authority
„ aforeſaid, that where as diuerſe perſons haue
„ purchaſed or haue eſtate, made and conueied,
„ of and in diuers lands, tenements, and hered-
„ taments, vnto them and to their wiues, and to
„ the heires of the husband, or to the husband
„ and to the wife, and to the heires of their two
„ bodies begotten, or to the heirs of one of their
„ bodies begotten, or to the husband and to the
„ wife for terme of their liues, or for terme of life
„ of the ſaid wife: or where any ſuch eſtate or
„ purchaſe of any lands, tenements, or hereditа-
„ ments, hath bin or hereafter ſhall bee made to
„ any husband and to his wife, in manner and
„ forme aboue expreſſed, or to any other perſon
„ or perſons, and to their heires and aſſignes, to
„ the vſe and behooſe of the ſaid husband and
„ wife, or to the vſe of the wife, as is before re-
„ hearſed, for the iointer of the wife: that then in
„ euery ſuch caſe, euery woman married, hauing
„ ſuch iointer made or hereafter to be made, ſhall
„ not claime, nor haue title to haue any dower of
„ the reſidue of the lands, tenemẽtes, or hereditа-
„ ments, that at any time were her ſaid husbands
„ by whom ſhe hath any ſuch iointer, nor ſhall
„ demand nor claime her dower of and againſt
„ them that haue the lands and inheritaunces of

her

her ſaid husband. But if ſhe haue no ſuch ioin- „
ter, then ſhe ſhall be admitted and inabled to „
purſue, haue and demand her dower, by writ „
of dower, after the due courſe and order of the „
common lawes of this realme: this act or any „
law or prouiſion made to the contrarie thereof „
notwithſtanding. „

Prouided alway, that if any ſuch woman be „
lawfully expulſed or euicted from her ſaid ioin- „
ter, or from any part therof: without any fraud „
or couin, by lawfull entree, action, or by diſcō- „
tinuance of her husband: then euery ſuch wo- „
man ſhal be indowed of as much of the reſidue „
of her husbands tenements, or hereditaments, „
whereof ſhe was before dowable, as the ſame „
lands and tenements ſo euicted and expulſed, „
ſhall amount or extend vnto. „

Prouided alſo, that this act, nor any thinge „
therein conteined or expreſſed, extend, or be „
in any wiſe hurtfull or preiudiciall to any wo- „
man or women heretofore being married, of, „
for, or concerning ſuch right, title, vſe, intereſt, „
or poſſeſſion, as they or any of them haue, „
claime, or pretēd to haue, for her or their ioin- „
ter or dower, of, in, or to, any manors, lands, te- „
nementes, or other hereditamentes of any of „
their late husbands, being now dead or decea- „
ſed, any thing conteined in this act to the con- „
trary notwithſtanding. „

Prouided alſo, that if any wife haue, or here- „
after ſhall haue, any manors, lands, tenements, „
or hereditaments, vnto her giuen or aſſured, af- „
ter mariage for terme of her life, or otherwiſe „

in

„ in iointer, except the ſame aſſurance be to her
„ made by act of parliament,and the ſaid wife,af-
„ ter that fortune to ouer-liue the ſame her huſ-
„ band,in whoſe time the ſaid iointer was made
„ or aſſured vnto her,that then the ſame wife, ſo
„ ouer liuing,ſhall and may at their liberty, after
„ the death of her ſaid husband, refuſe to haue &
„ take the lands and tenements, ſo to her giuen,
„ appointed,or aſſured,during the couerture,for
„ terme of her life,or otherwiſe in iointer : ex-
„ cept the ſame aſſurance be to her made by acte
„ of parliament,as is aforeſaid,and thereupon,to
„ haue, aske, demaund and take, her dower by
„ write of dower or otherwiſe, according to the
„ common law,of and in all ſuch landes , tene-
„ ments,and hereditaments,as her husband was
„ and ſtood ſeized of any ſtate of inheritance, at
„ any time during the couerture, any thing con-
„ teined in this act to the contrary , in any wiſe
„ notwithſtanding.

„ Prouided alſo,that this preſent act, nor anie
„ thing therein conteined, extend, or be at anie
„ time hereafter interpretated,expounded,or ta-
„ ken to extinct,releaſe,diſcharge , or ſuſpend a-
„ nie ſtatute,recognizance,or other bond,by the
„ execution of any eſtate,of or in any lands , te-
„ nements,or hereditaments,by the authority of
„ this act,to any perſon or perſons,or bodies po-
„ litike: any thinge conteined in this acte to the
„ contrary thereof notwithſtanding.

„ And for as much as great ambiguities and
„ doubts may ariſe of the validity and inualidity
„ of wils heretofore made of any landes , tene-

ments,

ments,& hereditaments,to the great trouble of „
the kings ſubiects,the kings moſt roial maieſty, „
minding the tranquillitie and reſt of his louing „
ſubiects,of his moſt excellent and accuſtomed „
goodneſſe,is pleaſed,and contented, that it be „
enacted by the authority of this preſent parlia- „
ment,that all maner true and iuſt willes and te- „
ſtaments heretofore made by any perſonne or „
perſons,deceaſed, or that ſhall deceaſe before „
the firſt day of May,that ſhall be in the yeere of „
our Lord God 1536,of any lands, tenements, „
or other hereditaments, ſhall be taken and ac- „
cepted good and effectual in the law,after ſuch „
faſhion,maner,and forme, as they were com- „
monly taken,and vſed at any time within forty „
yeeres next afore the making of this acte: anie „
thing conteined in this act, or in the preamble „
thereof,or any opinion of the common law,to „
the contrarie thereof notwithſtanding. „

Prouided alwaies,that the kinges highneſſe „
ſhall not haue,demand, or take any aduantage „
or profit,for or by occaſion of the executing of „
any eſtate onely,by authority of this act,to any „
perſon or perſons, or bodies politike, which „
now haue, or on this ſide the ſaid firſt day of „
Maie,which ſhall be in the yeere of our Lorde „
God 1536,ſhall haue any vſe or vſes, truſtes or „
confidences,in any manors,lands, tenements, „
or hereditaments, holden of the kinges high- „
neſſe,by reaſon of primer ſeizon, liuerie, *Ouſter* „
le maine,fine for alienation, releeſe, or hariotte: „
but that fines for alienations,releeſes, and ha- „
riots, ſhalbe paied to the kinges highneſſe. And „

alſo.

„ alſo liueries and *Ouſter le maines* ſhall bee ſued
„ for vſes, truſts, and confidences to be made and
„ executed in poſſeſſion, by authority of this act,
„ after and from the ſaid firſt day of May, of lands
„ and tenements, and other hereditamentes hol-
„ den of the king, in ſuch like maner and forme,
„ to all intents, conſtructions, and purpoſes, as
„ hath heretofore beene vſed or accuſtomed, by
„ the order of the laws of this realme.

„ Prouided alſo, that no other perſon or per-
„ ſons, or bodies politike, of whom any lands, te-
„ nements, or hereditaments, be or hereafter ſhal
„ be holden mediat or immediat, ſhal in any wiſe
„ demand or take any fine, releefe, or harriot, for
„ or by occaſion of the executing of any eſtate
„ by the authority of this acte to any perſon or
„ perſons, or bodies politike, before the ſaid firſt
„ day of May, which ſhall be in the yeere of our
„ Lord God 1536.

„ And bee it enacted by the authority afore-
„ ſaid, that all and ſinguler perſon and perſons,
„ and bodies politike, which at any time on this
„ ſide the ſaid firſt day of Maie, which ſhall be in
„ the yeere of our Lord God 1536, ſhall haue a-
„ nie eſtate vnto them executed of and in anie
„ lands, tenements, or hereditaments, by the au-
„ thority of this act, ſhall and may haue and take
„ the ſame or like aduantage, benefit, voucher,
„ aid, praier, remedy, commoditie, and profit by
„ action, entree, condition, or otherwiſe, to all in-
„ tents, conſtructions, & purpoſes, as the perſon
„ or perſons ſeized to their vſe, of or in any ſuch
„ lands, tenements, or hereditaments, ſo execu-

ted,

ted,had,ſhould, might or ought to haue had „
at the time of the execution of the eſtate there- „
of,by the authority of this act, againſt any o- „
ther perſon,or perſons,of or for any waſt, diſ- „
ſeizon,treſpaſſe,condition broken, or any o- „
ther offence,cauſe or thing concerning or tou- „
ching the ſaid lands,or tenements,ſo executed „
by the authority of this act. „

Prouided alſo,and be it enacted by the au- „
thority aforeſaid,that actions now depending „
againſt any perſon or perſons,ſeaſed of or in a- „
ny lands,tenements or hereditaments, to any „
vſe,truſt,or confidence,ſhal not abate ne be diſ- „
charged for or by reaſon of executing of any e- „
ſtate therof by authority of this act, before the „
ſaid firſt day of May,which ſhall be in the yeere „
of our lord God. 1536. any thing conteined in „
this act to the contrarie notwithſtanding. „

Prouided alſo, that this acte nor any thing „
therein conteined, ſhall not bee preiudici- „
all to the kings highnes for wardſhips of heires „
now being within age, nor for liueries or for „
Ouſter le mains, to be ſued by any perſon or per- „
ſons,now being within age,or of ful age,of any „
landes, or tenementes, vnto the ſame heire „
or heires now all ready deſcended: any thing „
in this act contained to the contrarie notwith- „
ſtanding. „

Prouided alſo,and be it enacted by the au- „
thority aforeſaid,that all and ſinguler recogni- „
ſances heretofore knowledged, taken,or made „
to the kinges vſe,for or concerning any reco- „
ueries of any landes, tenementes, or heredi- „

„ taments heretofore vſed or had, by write or
„ writs, of entree vpon diſſeizon in *Le poſt*, ſhall
„ from henceforth be vtterly voide and of none
„ effect, to all intents, conſtructions, & purpoſes.
„ Prouided alſo, that this act, nor any thing
„ therein conteined, be in any wiſe preiudicial or
„ hurtfull to anie perſon or perſons borne in
„ Wales, or the marches of the ſame, which ſhall
„ haue any eſtate to them executed by authority
„ of this act in any lands, tenements, or other he-
„ reditaments within this realme, whereof any o-
„ ther perſon or perſons now ſtand or be ſeized,
„ to the vſe of any ſuch perſon or perſons borne
„ in Wales, or the marches of the ſame: but
„ that the ſame perſō or perſons borne in Wales
„ or the marches of the ſame, ſhall or may lawful-
„ lie haue, reteine and keepe the ſame lands, te-
„ nements, or other hereditaments, whereof e-
„ ſtate ſhall be ſo vnto them executed by the au-
„ thority of this act, according to the tenor of the
„ ſame: any thing in this act conteined, or any o-
„ ther acte or prouiſion heretofore had or made,
„ to the contrary notwithſtanding.

Certaine caſes wherein by the ſtatutes of this realme, it is lawfull to deuiſe landes, tenementes or hereditaments.

§.iiij.

NOwe follow certaine other caſes authoriſed by the ſtatuts of this realme of England, wherein it is lawfull to be-

bequeath or deuiſe lands, tenements and hereditamentes by will; ſometimes wholy, and ſometimes in part onely, or rateably, according to the nature of the tenure of ſuch lands, tenements and hereditamentes, as in the ſame ſtatuts, which I haue here ſet downe at large doth appeare.

An Acte, declaring how by the

Kinges grant landes, tenementes and hereditamentes, may be by will, teſtament, or otherwiſe diſpoſed, and concerning wards and primer ſeaſin, &c.

Anno 32 H. 8. c. 1.

WHere the kinges moſt roiall maieſtie in all the time of his moſte gratious and noble reigne hath euer beene mercifull, louing and beneuolent, and moſt gratious ſouereigne lord vnto all and ſinguler his louing and obedient ſubiectes, and at many times paſt hath not onelie ſhewed and imparted to them generally by his manie and often great & beneficial pardons heretofore by authority of his parlemẽts granted, but alſo by diuers other waies and meanes many great and ample grants and benignities in ſuch wiſe, as al his ſaid ſubiects bin moſt bounden to the vttermoſt of all their powers and graces by them receiued of God, to render and giue vnto his maieſtie

„ ieſty their moſt humble reuerence & obedient
„ thanks and ſeruices, with their daily and conti-
„ nuall praier to almighty God, for the continual
„ preſeruation of his moſt roiall eſtate, in moſt
„ kingly honour and proſperity: yet alwaies his
„ maieſty being repleat and endowed by God
„ with grace, goodnes, and liberality, moſt ten-
„ derly conſidering that his ſaid obedient and lo-
„ uing ſubiects can not vſe or exerciſe thẽſelues,
„ according to their eſtats, degrees, faculties and
„ qualities, or to beare themſelues in ſuch wiſe,
„ as that they may conuenientlie keep and main-
„ taine their hoſpitalities and families, nor the
„ good educations, and bringing vp of their law-
„ full generations, which in this realme laude be
„ to God, is in all parts very great and abundant,
„ but that in maner of neceſſity, as by daily expe-
„ rience is manifeſted and knowen, they ſhal not
„ be able of their proper goods, cattelles, and o-
„ ther moueable ſubſtãce to diſcharge their debts,
„ tes, and after their degrees ſet foorth and ad-
„ uance their children & poſterities: Wherefore
„ our ſaid ſoueraigne Lord moſt vertuouſly con-
„ ſidering the mortality that is to euery perſon
„ at Gods will and pleaſure moſt common & vn-
„ certaine, of his moſt bleſſed diſpoſition and li-
„ berality being willing to releeue & help his ſaid
„ ſubiects in their ſaid neceſſities and debility, is
„ contented and pleaſed that it be ordained, and
„ enacted by authority of this preſent parliament
„ in manner and forme as hereafter followeth;
„ that is to ſay, that all and euery perſon and per-
„ ſons hauing, or which hereafter ſhall haue any

ma-

manours,landes,tenements or hereditaments, »
holden in ſocage or of the nature of ſocage te- »
nure,and not hauing any manours, lands, te- »
nements,or hereditaments,holden of the king »
our ſoueraigne Lord by knights ſeruice, by ſo- »
cage tenure in chefe,or of the nature of ſocage »
tenure in cheef,nor of any other perſon or per- »
ſons by knights ſeruice from the 20. day of Iu- »
lie in the yeere of our Lord God 1500.& for- »
ty,ſhall haue ful and free liberty, power and au- »
thority to giue,diſpoſe,will and deuiſe, as well »
by his laſt will and teſtament in writinge or o- »
therwiſe, by any acte or actes lawfully execu- »
ted in his life,all his ſaid manours,landes,tene- »
mentes,or hereditaments, or any of them at »
his free will and pleaſure,any lawe,ſtatute, or »
other thing heretofore had, made or vſed, to »
the contrary notwithſtanding. »

And that all and euery perſone and per- »
ſons,hauing manours,landes, tenementes, or »
hereditamentes, holden of the king our ſoue- »
raigne Lorde his heires or ſucceſſours in ſo- »
cage, or of the nature of ſocage tenure in »
cheefe, and hauing any other manours, lands, »
tenementes, or hereditamentes holden of »
any other perſon or perſons in ſocage, or of »
the nature of ſocage tenure, and not hauing »
anie manours, landes, tenementes, or heredi- »
tamentes, holden of the king our ſoueraigne »
Lorde by knightes ſeruice, nor of anie other »
Lorde or perſon by like ſeruice, from the 20. »
daie of Iulie in the ſaid yeere of our Lord God »
1500,and fortie,ſhal haue full and free liberty, »

„ power and authority to giue, will, diſpoſe and
„ deuiſe, as wel by his laſt wil or teſtament in wri-
„ ting or otherwiſe, by any acte or actes lawfullie
„ executed in his life, all his ſaid manors, landes,
„ tenements and hereditaments, or any of them
„ at his free will and pleaſure, any law, ſtatute, cu-
„ ſtome or other thing heretofore had, made, or
„ vſed to the contrarie notwithſtanding. Sauing
„ alway and reſeruing to the king our ſoueraigne
„ lord his heires and ſucceſſors, all his right, title,
„ and intereſt of primer ſeizon, releefes, and alſo
„ all other rights and duties for tenures in ſocage
„ or of the nature of ſocage tenure in cheefe, as
„ heretofore hath beene vſed and accuſtomed,
„ the ſame manors, lands, tenements or heredi-
„ taments to be taken, had, and ſued out of and
„ from the hands of his highneſſe his heires and
„ ſucceſſors by the perſon or perſons to whome
„ any ſuch manors, lands, tenements or heredita-
„ ments, ſhall be diſpoſed, willed, or deuiſed in
„ ſuch and like manner and forme as hath beene
„ vſed by any heire or heires before the makinge
„ of this eſtatute. And ſauing and reſeruing alſo
„ fines for alienations of ſuch manors, landes, te-
„ nements, or hereditaments holden of the king
„ our ſoueraigne lord in ſocage, or of the nature
„ of ſocage tenure in cheeſe, wherof there ſhal be
„ any alteration of freehold or inheritance, made
„ by will or otherwiſe as is aforeſaid.

„ And it is further enacted by the authority a-
„ foreſaid, that al and ſinguler perſon & perſons
„ hauing any manors, lands, tenemēts or heredi-
„ taments of eſtate of inheritance, holden of the

kings

kings highneſſe in cheefe,by knights ſeruice,or „
of the nature of knights ſeruice in cheefe,from „
the ſaid twentie day of Iulie , ſhall haue full „
power and authoritie,by his laſt wil by writing „
or otherwiſe by anie act or acts lawfullie exe- „
cuted in his life,to giue,diſpoſe, will or aſſigne „
two partes of the ſame manors, landes, tene- „
ments or hereditaments,in three partes to bee „
diuided, or elſe as much of the ſaide manors, „
lands,tenements or hereditaments, as ſhall ex- „
tend or amounte to the yeerelie value of two „
parts of the ſame in three partes to be deuided „
in certentie and by ſpeciall deuiſions, as it may „
be knowen in ſeueralty,toand for the aduance- „
ment of his wife, preferment of his children, „
and paiment of his debtes , or otherwiſe at his „
will and pleaſure,anie law, ſtatute, cuſtome or „
other thing to the contrarie thereof notwith- „
ſtanding. Sauing and reſeruing to the king our „
ſouereigne lord,the cuſtodie,wardſhip, & pri- „
mer ſeizon or any of them, as the caſe ſhall re- „
quire,of as much of the ſame manors,lands,te- „
nements or hereditaments,as ſhal amount and „
extende to the full and cleere yeerelie value of „
the third parte thereof without any diminuti- „
on,dower,fraud,couin,charge, or abridgment „
of anie of the ſame third part, or of the full pro- „
fits thereof : Sauing alſo and reſeruing to the „
king our ſaid ſoueraigne lord, all fines for alie- „
nations of all ſuch manors,lands, tenementes, „
and hereditamentes , holden of the kinge by „
knights ſeruice in cheefe,whereof there ſhal be „
any alteration of free-holde or inheritaunce, „

„ made by will or otherwiſe, as is abouesaide.

„ And be it enacted by authority aforesaide,
„ that all and singuler person and persons, ha-
„ uing manors, lands, tenementes, or hereditа-
„ ments of estate of inheritance, holden of the
„ king in cheefe by knights seruice, and hauinge
„ other manors, lands, tenements, or hereditа-
„ ments, holden of the king, or of any other per-
„ son or persons, by knights seruice or otherwiſe,
„ euerie such person and persons, from the said
„ twentie daie of Iulie shall haue full power and
„ authoritie to giue, dispose, will or assigne by his
„ last will in writing or otherwise by anie acte or
„ acts lawfullie executed in his life, two parts of
„ same manors, lands, tenementes, or hereditа-
„ mentes, in three partes to be deuided, or elſe as
„ much of the same manors, lands, tenemẽts, and
„ hereditaments, as shal extend or amount to the
„ yeerelie value of two parts of the same, in three
„ partes to be deuided in certeintie and by spеci-
„ all diuisions, as it may be knowen in seueraltie,
„ to and for the aduancement of his wife, prefer-
„ ment of his children, and paiment of his debts,
„ or otherwise at his will and pleasure, any lawe,
„ statute, custome or other thing to the contrarie
„ thereof notwithstanding. Sauing alwaie and
„ reseruing to the king our souereigne lorde, the
„ custodie, wardship, and primer seizon or any of
„ them, as the case shal require, of as much of the
„ same manors, lands, tenements, or other here-
„ ditaments, as shall amounte and extend to the
„ full and cleere yeerelie value of the third parte
„ thereof, without anie maner diminution, dow-

er,

er,fraud,couin,charge , or ſubtraction of the ,,
ſame third parte, or of the full profites thereof. ,,
Sauing alwaie & reſeruing to our ſaide ſoue- ,,
raigne lord the king all fines for alienation of a- ,,
nie ſuch manors,lands,tenements,or hereditа- ,,
ments, holden of the king by knightes ſeruice ,,
in cheefe, whereof there ſhall be anie alteration ,,
of freehold or inheritaunce, made by will or ,,
otherwiſe, as is aboueſaid. ,,
Be it further enacted by the authoritie aboue- ,,
ſaid,that if anie perſon or perſons,hold any ma- ,,
nors,lands,tenementes,or hereditaments,one- ,,
lie of any other lord or perſon,than of the king ,,
our ſaid ſouereigne lorde by knightes ſeruice, ,,
and other lands,and tenementes in ſocage, or ,,
of the nature of ſocage tenure,that then euerie ,,
ſuch perſon ſhall or may giue,diſpoſe,or aſſure, ,,
by his laſt will or otherwiſe by anie act or actes, ,,
lawfullie executed in his life,two partes of the ,,
ſaid manors,lands,and tenementes,holden by ,,
knights ſeruice , or of as much thereof as ſhall ,,
amount to the full yeerelie value of two partes, ,,
in maner and forme as is aboue declared : and ,,
alſo all the landes and tenementes, holden by ,,
ſocage,or of the nature of ſocage tenure, at his ,,
will and pleaſure as is aboue written , ſauinge ,,
and reſeruing to the lord of the lands and tene- ,,
ments,holden by knightes ſeruice, for his cuſ- ,,
todie and wardſhip,as much of the ſame lands ,,
and tenementes,as ſhall extend or amounte to ,,
the full and cleere yeerelie value of the third ,,
part of the ſame landes and tenements,holden ,,
by knights ſeruice , without anie diminution, ,,

„ dower,fraud, couin, charge, or ſubtraction of
„ anie portion of that third part, or of the cleere
„ yeerelie value thereof in manner and forme a-
„ foreſaid.

„ And be it further enacted by the authoritie
„ aboueſaid, that if any perſon or perſons hold ā-
„ nie manors, landes, tenementes, or hereditā-
„ mentes,onelie of the king our ſoueraigne lord
„ by knightes ſeruice and not in cheefe, or hold
„ anie manors,landes, tenementes, or hereditā-
„ mentes of our ſaid ſoueraigne lord by knights
„ ſeruice and not in cheefe, and alſo holde other
„ manors,landes,tenementes, and other hereditā-
„ tamentes, of anie other perſon or perſons by
„ knights ſeruice, and alſo holde other manors,
„ landes,tenementes,or hereditamentes, of anie
„ other perſon or perſons in ſocage, or of the na-
„ ture of ſocage tenure, that then all and euerie
„ ſuch perſon and perſons, ſhall and maie giue,
„ diſpoſe,will,deuiſe,and aſſure, by his laſt wil or
„ otherwiſe,by anie acte or acts lawfullie doone
„ and executed in his life two partes of the ſame
„ manors,landes,tenements and hereditaments,
„ holden of our ſaid ſoueraigne lord the king by
„ knights ſeruice,and two partes of the manors,
„ landes,tenements,and hereditaments, holden
„ of anie other perſon or perſons by knights ſer-
„ uice, or as much of either of them as ſhall a-
„ mount to the full yeerelie value of two partes,
„ in maner and forme as is aboue declared: and
„ alſo of all his lands and tenements,ſo holden in
„ ſocage,or of the nature of ſocage tenure, at his
„ free will and pleaſure. Sauing and reſeruing to

the

the kings highneſſe, the cuſtodie and wardſhip „
of as much of the ſame manors, landes, tene- „
mentes,or other hereditaments, as ſhal extend „
and amount to the ful and cleere yeerelie value „
of the third part of the ſaid manors,lands,tene- „
mentes, and hereditaments, ſo holden of his „
highneſſe by knightes ſeruice,without anie di- „
minution,dower,fraud,couin,charge, and ſub- „
traction of anie portion of that third part, or of „
the full profites thereof. And alſo ſauinge and „
reſeruing to the lords of whom anie of the ſaid „
manors,landes,tenementes, or other heredita- „
mentes beene holden by knightes ſeruice for „
cuſtodie and wardſhip , as much of the ſame „
manors,lands,tenementes or hereditamentes, „
holden of them or anie of them by knights ſer- „
uice,as ſhall extend and amount to the full and „
cleere yeerelie value of the third parte of the „
ſame,without anie diminution,charge, fraude, „
couin , or ſubtraction of anie portion of that „
third,or of the cleere yeerelie value of the third „
part therof,in manr & forme aboue declared. „

Prouided alwaie and it is further enacted by „
the authority aforeſaid ,that if that third part of „
the manors,landes, tenementes, or heredita- „
ments,of anie of the kings ſubiectes , which in „
anie of the caſes aboue ſaid,ſhal hereafter come „
to the kings highneſſe,his heires or ſucceſſors, „
by vertue of this acte,as is aboueſaid, be not or „
doo not amount to the cleere yeerelie value of „
the third part of all the ſaid manors,lands,tene- „
mentes,or other hereditaments , whereof the „
kings highneſſe is or ſhall be intituled to haue „

the

„ the cuſtodie or primer ſeizon, as is aboue ſaid:
„ that then our ſaid ſoueraigne lorde, and his
„ heires ſhall and maie at his or their free liber-
„ tie and pleaſure, take into his or their handes &
„ poſſeſſions, as of the other two partes of the
„ ſaid manors, landes, tenementes, and other he-
„ reditamentes, as with that of the ſame manors,
„ lands, tenementes, or hereditamentes, holden
„ and remaining in the kings hands, ſhal make vp
„ the cleere yeerelie value of the full third parte
„ of the ſaid manors, and tenementes, ſo to bee
„ had to the kinges highneſſe in title of ward-
„ ſhip and primer ſeizon, or anie of them, as the
„ caſe ſhall require, and like benefit and aduan-
„ tage to be giuen to euerie lorde and lordes, of
„ whom anie ſuch manors, lands, tenementes, or
„ hereditamentes, beene or ſhall bee holden by
„ knightes ſeruice as is aboueſaid, concerninge
„ onelie his third part of or for title of wardſhip.
„ Prouided alwaie, and bee it further enacted
„ by the authoritie aforeſaid, that euerie perſon
„ and perſons, ſhall ſue their liueries, for poſſeſſi-
„ ons, reuerſions, or remainders, and alſo paie re-
„ leefes and heriots after ſuch maner and forme,
„ as they ſhould or ought to haue doone before
„ the making of this acte, and as if this acte had
„ neuer beene made. And that fines for aliena-
„ tions ſhall be paid in the kinges chancerie, for
„ and vpon writes of entree in the poſt, to be ob-
„ teined in the ſame courte of chancerie, after the
„ ſaid twentie daie of Iulie, for common reco-
„ ueries, to be had or ſuffered of anie manors,
„ landes, tenementes, or hereditamentes, holden

of the king in cheefe : in like maner and forme ,,
as is vſed vpon alienations of ſuch manors, ,,
landes,tenementes,or hereditamentes, ſo hol- ,,
den in cheefe,by fine or feoffement. ,,

Prouided alſo and be it enacted by the au- ,,
thoritie aforeſaid,that in ſuch caſes,where fines ,,
for alienations ſhal be paied in the kings chãce- ,,
rie,for writes of entree in poſt, as is aforeſaide, ,,
that then none other fine ſhall bee paied in the ,,
ſame courte for anie ſuch writes, anie vſage or ,,
cuſtome to the contrarie thereof notwithſtan- ,,
ding. ,,

And be it further enacted by the authoritie ,,
afore-ſaide, that where two or more perſons ,,
now holde, or hereafter ſhall holde anie ma- ,,
nors,landes,tenementes or hereditamentes,of ,,
the king our ſoueraigne lorde by knightes ſer- ,,
uice, iointlie to them and to the heires of one ,,
of them,and he that hath the inheritance ther- ,,
of dieth,his heire being within age, that in e- ,,
uerie ſuch caſe the king ſhall haue the warde ,,
and mariage of the bodie of ſuch heire ſo be- ,,
ing within age , the life of the freeholder or ,,
freeholders of the ſaid manors , landes , tene- ,,
ments, or hereditaments,ſo holden by knights ,,
ſeruice notwithſtanding. Sauing and reſeruing ,,
to all and euerie woman and women all and e- ,,
uerie ſuch right,title,intereſt of dower, as they ,,
or any of them ought to haue, or bee or ſhall ,,
be iuſtlie intituled to haue claime or demand ,,
of anie manors,landes, tenementes or heredi- ,,
tamentes by the lawes of this realme, to be ta- ,,
ken or aſſigned vnto them or anie of them, out ,,

of

„ of the two partes of the ſaid manors,landes,te-
„ nementes or hereditaments, ſeuered and deui-
„ ded from the third part, as is aboue ſaid, and
„ not otherwiſe: And ſauing alſo to the king our
„ ſoueraigne lord,his heires and ſucceſſours, the
„ reuerſions of all ſuch tenauntes in ioyntenure
„ and dower,immediately after the deathof ſuch
„ tenauntes,if they ſhall happen to die, duringe
„ the minoritie of the kinges wardes.

An other acte for the Explanation of the former, concerning willes, and the deuiſe of landes.

„ WHether in the laſte parlia-
„ ment, begunne and hol-
„ den at Weſtminſter the
„ 28. day of Aprill, in the 31.
„ yeere of the kinges moſt
„ gratious raigne (cap. primo
„ willes. 2.) And there by di-
„ uers prorogations holden and contiued vnto
„ the 24. daie of Iulie,in the 32. yeere of his ſaide
„ raigne. It was by the kings moſt gratious and li-
„ berall diſpoſition,ſhewed toward his moſt hũ-
„ ble and obedient ſubiects, ordeined and enac-
„ ted,howe and in what manner, landes, tene-
„ mentes,and hereditamentes,might by will, or
„ teſtament,in writing,or otherwiſe by anie acte
„ or actes lawfullie executed in the life of euerie
„ perſon giuen,dipoſed, willed, or deuiſed, for
the

the aduauncement of the wife, prefermente of children, paiment of debtes, of euerie ſuch perſon, or otherwiſe, at his wil or pleaſure, as in the ſame acte more plainelie is declared. Sithen the making of eſtatute, diuers doubtes, queſtions, and ambiguities, haue riſen, beene moued and growen, by diuerſity of opinions taking, in and vpon the expoſition of the letter of the ſame eſtatute.

For a plaine declaration and explanacion whereof, and to the intent and purpoſe, that the kinges obedient and louing ſubiectes, ſhall and may take the commoditie and aduantage of the kinges ſaid gratious and liberall diſpoſition, the lordes ſpiritual and temporall, and the commons in this preſent parliament aſſembled, moſt humbly beſeeching the kings maieſtie, that the meaning of the letter of the ſame eſtatute, concerning ſuch matters hereafter rehearſed, may be by the authority of this preſēt parliament enacted taken, expounded, iudged, declared, and explaned, in manner and fourme following.

Firſtwhere it is contained in the ſame former ſtatute, within diuers articles & branches of the ſame, that all and ſinguler perſon and perſons, hauing any manors, lands, tenements, or hereditamentes, of the eſtate of inheritance, ſhould haue full and free libertie, power and authoritie, to giue, will, diſpoſe, or aſſigne, as well by laſt will and teſtament in writing, or otherwiſe, by anie act or actes lawfullie executed in his life his manours, landes, tenementes, or here-

„ hereditaments, or anie of them in ſuch man-
„ ner and fourme, as in the ſame former act more
„ at large it dooth appeare. Which wordes of eſ-
„ tate of inheritaunce, by the authority of this
„ preſent parliament, is and ſhall be declared, ex-
„ pounded, taken, and iudged, of eſtates in fee
„ ſimple onelie. And alſo that all and ſingu-
„ ler perſon and perſons, hauing a ſole eſtate
„ or intereſt in fee-ſimple, or ſeized in fee-ſimple,
„ in copercenarie, or in common in fee-ſimple,
„ of & in anie ma nors, lands, tenements, rents, or
„ other hereditaments, in poſſeſſion, reuerſion or
„ remainder, or of rents or ſeruices incident to a-
„ nie reuerſion or remainder, and hauing no ma-
„ nors, lands, tenements, or hereditaments hol-
„ den of the king, his heires or ſucceſſors, or of a-
„ ny other perſon or perſons by knights ſeruice,
„ ſhall haue full and free liberty, power and au-
„ thority to giue, diſpoſe, will or deuiſe, to anie
„ perſon or perſons (except bodies politike and
„ corporate) by his laſt wil and teſtament, in wri-
„ ting, or otherwiſe, by any act or actes, lawfullie
„ executed in his life, by him ſelfe ſoly, or by him-
„ ſelfe and other iointly, ſeuerally, or particular-
„ lie, or by al thoſe waies or any of them, as much
„ as in him of right is or ſhall be, all his ſaid ma-
„ nors, lands, tenements, rentes, and hereditа-
„ ments, or any of them, or any rents, commons,
„ or other profits, or commodities, out of, or to
„ be perceiued of the ſame, or out of any parcell
„ thereof, at his owne free will and pleaſure any
„ clauſe in the ſaide former acte notwithſtan-
„ ding.

And

And further be it declared & enacted by the
authority aforeſaid, that al & ſinguler perſon &
perſõs, hauing a ſole eſtate or intereſt in fee-ſim-
ple, or ſeized in fee-ſimple in copercenery, or in
cõmon in fee-ſimple, of or in, anie manors, lãds
tenements, rentes, or other hereditamentes, in
poſſeſſion, reuerſion, or remainder, or of & in,
any rents or ſeruices incident to any reuerſion
or remainder, holdẽ of the king by knights ſer-
uice in cheef, or of the nature of knights ſeruice
in cheefe, hath & by the authority of this pre-
ſent parliament ſhall haue full and free liberty,
power, & authoritie to giue, diſpoſe, will, or aſ-
ſigne to any perſõ or perſõs (except bodies po-
litike & corporate) by his laſt will & teſtament
in writing, or otherwiſe by any act or acts, law-
fully executed in his life, by him ſelfe ſoly, or by
himſelf & other iointly, ſeuerally, or particular-
ly, or by al thoſe waies or any of them, as much
as in him of right is or ſhall be, two parts aſwell
of al the ſaid manors, lands, tenementes, rents,
and hereditaments, as of all and ſinguler his o-
ther rents & hereditaments, or of any of them,
or anie rents, commons, or other profits or cõ-
modities, out of, or to be perceiued of the ſame
two parts, or out of any parcell thereof, in three
partes to be deuided, or as much therof as ſhal
amount to the full and cleere yeerelie value of
two parts thereof, in three parts to be diuided,
of what perſon or perſons ſo euer they be hol-
den, at his free will and pleaſure. And that by
the authority aforeſaid, the ſaid will ſo decla-
red ſhalbe good and effectuall for two parts of
the ſaid manours, lands, tenements and heredi-

taments,although the will ſo declared be made of the whole,or of more than of two parts of the ſame. The ſame diuiſion to be made and ſet forth,by the deuiſour or owner of the ſame manours,lands,tenements and hereditaments by his laſt will in writing, or otherwiſe in writing. And in default therof, by a commiſſion to be graunted out of the kinges courte of the wards and liueries, vpon the enquirie of the true value therof,by the othes of 12.men, and returne or certificate thereof had in the ſame court, of the ſaid manours,lands, tenementes, and hereditaments,diuiſion to be made by the maſter of the wards and liueries, if the maiſter of the wards and liueries for the time beeing, and the parties therunto can not otherwiſe agree vpon the ſame diuiſion. And that the iſſues and profits of the two partes of the ſame manours,lands,tenements,and hereditaments vpon euery ſuch diuiſion, to bee reſtored to them,that ſhall haue right, or title to the ſame, frō the death of the owner or deuiſour therof.

And further be it enacted and declared, by authoritie aforeſaid, that all and ſinguler perſon and perſons, hauing a ſole eſtate or intereſt in fee-ſimple,or ſeized in fee-ſimple, in copercenary, or in common,in fee-ſimple,of and in any manours,lands,tenements,rents, or other hereditaments,in poſſeſſion, reuerſion or remainder, or of and in any rents,or ſeruices, incident to any reuerſion or remainder, holden of the king,his heires or ſucceſſours by knights ſeruice,and not in cheefe, or holden of any other

ther perſon or perſons by knights ſeruice ſhall haue full and free libertie, power and authority, to giue, diſpoſe, will, or deuiſe, to any perſon or perſons, except bodies politike and corporate, by his laſt will and teſtament in writing, or otherwiſe, by any act or acts lawfully executed in his life, by himſelfe ſolie or by himſelfe and other iointly, ſeuerally, or particularly, or by all thoſe waies, or any of them, as much as in him of right is or ſhall bee, two parts of all the ſaide manors, lands, tenements and hereditaments, or any of them ſo holden by knights ſeruice, or any rents common or other profits or commodities, out of, or to be perceiued of the ſame two parts, or out of any parcell thereof, in three parts to be deuided, or as much thereof, as ſhal amount to the full and cleere yeerely value of two parts thereof, in three parts to be deuided, at his free will & pleaſure. And that the ſaid will ſo declared, by authority aforeſaid, ſhalbe good and effectuall, for two parts of the ſaid manors, lands, tenements, or hereditaments, although the will ſo declared be, or ſhalbe made, of the whole landes, and tenementes, ſo holden by knights ſeruice, or of more, than of two partes of the ſame. And alſo for the whole of all other ſuch manours, lands, tenements, and hereditaments, or any of them, not holden of the kinge by knights ſeruice in cheefe, or otherwiſe by knights ſeruice, nor of anie other perſon by kinghts ſeruice, and of any rents, commons, or other profits or commodities, out of, or to bee perceiued of the ſame, or out of any parcell

„ thereof at his free will and pleasure. The same
„ diuision to be made and set foorth, by the ow-
„ ner of the said manours, lands, tenementes, and
„ hereditaments, by his last will and testament in
„ writing, or otherwise in writing. And in de-
„ fault thereof, for as much of the same manors,
„ lands, tenements, and hereditaments, as shall
„ concerne the kings interest, by commission, to
„ be directed out of the kings court of the wards
„ and liueries, in maner & forme as is aforesaid,
„ if the master of the wardes and liueries for the
„ time being, and the parties thereunto can not
„ otherwise agree vpon the same diuision. And
„ that restitution of the issues and profits of the
„ two parts thereof, shalbe had and made, in ma-
„ ner and fourme abouesaid. And for such of the
„ same manors, lands, tenementes, and hereditа-
„ ments, as shall concerne the interest of any o-
„ ther lord or lords, by commission to be graun-
„ ted out of the kings court of the Chauncery, to
„ enquire thereof, by the othes of 12. men, if the
„ same lord or lordes, and the parties thereunto
„ can not otherwise agree vpon the same diuisiō.
„ And be it further enacted and declared by
„ authority aforesaid, that the sauings, reseruings,
„ and prouisions, concerning sauing of the cu-
„ stodie, wardship, releese, and primer season
„ to the king, of such manors, lands, tenements,
„ and hereditaments, or as much thereof, as
„ shall appertaine vnto him, by vertue of the said
„ former act, and by the declaratiō and expositiō
„ thereof, declared by this present act, during the
„ kings interest therein. And also of the custody

and

and wardſhip to other lords, of as much of ſuch „
manours, lands, tenements, and hereditaments „
holden of them, as ſhall amounte and extende „
to the cleere yeerelie value of the third parte „
thereof ouer and aboue all charges, without a- „
ny diminution or abridgement of the thirde „
part, or of the full profits thereof, compriſed „
and mencioned in diuers articles in the ſaide „
former act contained, by the authority afore- „
ſaid be and ſhalbe intended, expounded, and „
taken, as hereafter enſueth: that is to ſay, that „
the king ſhall haue and take for his full thirde „
part, of all ſuch manours, lands, tenements, and „
hereditaments, where vnto he is or ſhall be in- „
titled by the ſaid former act, and by this pre- „
ſent act, ſuch manours, lands, and tenements, as „
ſhal by any meanes diſcend, or come by diſ- „
cent, as well of the eſtate of inheritaunce in fee „
taile, as in fee-ſimple, or in fee taile onely to the „
heire of any ſuch perſon or that ſhall make any „
will, gifte, diſpoſition, or deuiſe, by his laſt will „
in writing, or by any act or acts lawfully execu- „
ted in his life, immediately after the death of „
the ſame deuiſour or owner thereof. And that „
the will, gift and deuiſe, of euery ſuch deuiſour „
or owner, of and for the two partes of the ſaide „
manours, lands, tenements, and hereditaments „
reſidue, ſhall by the authority aforeſaid, be and „
ſtand good and effectuall in the law, albeit, the „
ſame will, gift or deuiſe, be had and made of „
all his fee ſimple lands, tenementes, and here- „
ditamentes, and in caſe the ſame manours, „
landes, tenementes, and hereditamentes, „
which after the death of anie ſuche owner „

„ or deuiſour, which ſhall make any ſuch gift, diſ-
„ poſition, or deuiſe, by his laſt will, in writing, or
„ otherwiſe, by any act or acts, lawfully executed
„ in his life, to his wife, children or otherwiſe, as
„ is aforeſaid, which ſhall immediatly after his
„ death, diſcend, reuert, remaine or come, to his
„ heire or heires, as well of eſtate of inheritaunce
„ in fee taile, as of eſtate in fee ſimple, or fee taile
„ onely, be not, or ſhall not amount or extend to
„ the full cleere yeerelie value of the full thirde
„ part, with the full profites thereof, of all the ſaid
„ manours, lands, tenements, or other hereditа-
„ ments of the ſaid deuiſour or owner, according
„ to the true intent and meaning of the ſaid for-
„ mer act, and of this preſent acte, that then the
„ king ſhall and may haue & take, into his handes
„ and poſſeſſion, to make vp his full third parte,
„ with the full profites thereof, according to his
„ intereſt therein, as much of the other manours,
„ lands, tenements, or hereditaments, willed, gi-
„ uen, diſpoſed, or aſſigned by any ſuch perſon,
„ to his wife, children or otherwiſe, as is afore-
„ ſaid, as with ſuch of the ſame, manours, lands,
„ tenements, and hereditaments diſcended, or
„ by any meanes come vnto the heire, as heire of
„ anie ſuch deuiſour or owner, ſhall make vp the
„ cleere yeerelie value of the ſaid full third parte
„ with the full profits thereof, of all the ſaid ma-
„ nours, lands, tenements, hereditaments, of eue-
„ rie ſuch owner or deuiſour, ſo to bee had to
„ the king, in the title of wardſhip or primer ſea-
„ ſon, as the caſe ſhall require. And the deuiſion
„ thereof, to be had and made, and with there-

ſtitution

ſtitution of the profits of the two partes of the „
ſaid manours,lands,tenemcntes, and heredita- „
mentes,in ſuch maner and fourme as is aboue „
rehearſed. And like benefit and aduantage, to „
be giuen,had and taken, by the ſaid authority, „
to euerie Lord and Lordes,of whom anie ſuch „
manours,lands, tenements,or hereditaments, „
beene or ſhall be holden by knightes ſeruice,in „
maner and fourme as is aboue ſaid,concerning „
onelie his or their third partes thereof, accor- „
ding to their ſaid intereſt therein. „

And be it further enacted,by the authoritie „
aforeſaid,that if it happen the ſame third parte, „
or anie part thereof, left,willed,or aſſigned,to „
the king or other lord,at anie time during their „
intereſtes therein,to be lawfullie euicted or de- „
termined,that than the king and the other lord, „
ſhall haue as much of the two partes reſidue, „
as ſhall accompliſh and make vppe a full thirde „
part,in cleere yeerelie value, after the rate and „
portion of ſuch manours,landes, tenementes, „
and hereditamentes,as ſhall then happen to re- „
maine of the ſame third part, not deuicted nor „
determined,and of the other two parts of ſuch „
manours, landes, tenementes, and heredita- „
mentes, as the kinge or other lorde ſhoulde or „
ought to haue had,by vertue of the ſaid former „
act,and this preſent act: and the ſame to be de- „
uided, in maner and fourme aboue rehearſed, „
anie clauſe in the ſaid former acte notwithſtan- „
ding. „

And be it further enacted and declared by „
the authoritie aforeſaid, that the ſauing and re- „

„ ſeruing for fines for alienation, by anie ſuch laſt
„ will and teſtament, of ſuch manours, landes, te-
„ nements, or hereditaments, holden of the king
„ by knightes ſeruice in cheefe, or of the nature
„ of knightes ſeruice in cheefe, or by ſocage in
„ cheefe, or of the nature of ſocage tenure in
„ cheefe, or for fines for alienation, of ſuch ma-
„ nours, landes, tenementes, or hereditamentes,
„ whereof there ſhall be anie alteration of free-
„ holde, or of inheritance, made by anie ſuch laſt
„ will, compriſed in diuers and ſundrie articles,
„ mencioned in the ſaid former acte, be and ſhall
„ be intended, expounded, taken, deemed and
„ iudged, by the authoritie aforeſaid, that all ſuch
„ perſon or perſons, to whom the ſaid manours,
„ landes, tenementes, or hereditamentes, or anie
„ of them, be or ſhall be giuen, diſpoſed, willed,
„ or deuiſed, by anie ſuch laſt will, ſhall be exone-
„ rated, acquited and diſcharged for euer, againſt
„ the king, his heires, and ſucceſſours, for all ſuch
„ fines for alienations, by anie ſuch laſt will or te-
„ ſtament, without licence, by ſuing forth of the
„ kinges pardon for alienation out of the kinges
„ courte of Chauncerie, paying to the king, his
„ heires or ſucceſſours, for the fine of euerie ſuch
„ alienation, the third parte of the yeerelie value
„ of the ſame manors, landes, tenementes or o-
„ ther here ditamentes, to him or them willed or
„ deuiſed, and this acte from time to time, ſhall
„ be a ſufficient warrant, to the lord chauncellor
„ of England, or keeper of the great ſeale, for the
„ time being, for the graunting out of the ſaide
„ pardon or pardons, vnder the kings great ſeale

as heretofore hath beene vſed for pardons for „
alinations, without anie further ſuite to bee „
made to the king for the ſame. „

And it is further declared & enacted, by the „
authoritie aforeſaid, that willes or teſtamentes, „
made of any manours, lands, tenements, or o- „
ther hereditaments, by any woman couerte, or „
perſon within the age of 21. yeeres, idiote, or by „
any perſon *de non ſane memorie*, ſhall not bee ta- „
ken to be good or effectuall in the lawe. „

And further be it enacted by the authoritie „
aforeſaide, that if anie perſon or perſons ha- „
uing eſtate of inheritaunce, of or in, manours, „
landes, tenementes or hereditamentes, holden „
of the king by knightes ſeruice in cheefe, or „
otherwiſe of the kinge by knightes ſeruice, or „
of anie other perſon or perſons by knights ſer- „
uice, hath giuen at anie time ſithen the 20. daie „
of the ſaid month of Iulij 32. H. 8. An. do. 1540. „
or hereafter ſhall giue, wil, deuiſe, or aſſigne, by „
will or other acte executed in his life, his ma- „
nours, landes, tenementes, or hereditamentes, „
or anie of them by fraude or couin, to anie „
other perſon or perſons, for terme of yeeres, „
life or liues, with one remainder ouer in fee, „
or with diuers remainders ouer for terme of „
yeeres, life or in taile, with a remainder ouer in „
fee ſimple to anie perſon or perſons, or to his „
or their right heires, or at anie time ſithen the „
ſaid 20. daie of Iulie, hath conueied or made; „
or hereafter ſhall conueie or make by fraude or „
couin contrarie to the true intent of this act, „
anie eſtates, conditions, menalties, tenures, or „

„ conueiaunces, to the intent to defraud or dif-
„ ceiue the king of his prærogatiue, primer ſeaſõ,
„ liueric, releef, wardſhip, mariages or rights: or a-
„ ny other lord of their wardſhips, releefs, heri-
„ ots, or other profites which ſhould or ought to
„ accrue, grow or come vnto thẽ or any of them,
„ by or after the death of his or their tenant, by
„ force and according to the former eſtatute and
„ of this preſent acte and declaration : and the
„ ſame eſtates and other conueiaunces, beeinge
„ found by office to be ſo made or contriued by
„ couin, fraude or diſceipt, as is aboueſaid, con-
„ trarie to the true intent and meaning of the ſaid
„ former acte, and of this act: That then the king
„ ſhall haue as well the wardſhippe of the bodie,
„ and cuſtodie of the landes, tenementes and he-
„ reditamentes, as liuerie, primer ſeaſon, releefe,
„ and other profites, which ſhoulde or ought to
„ appertaine to the kinge, according to the true
„ intent and meaning of the ſaid former acte, and
„ of this preſent acte, as though no ſuch eſtates
„ or conueiaunces by couin, had neuer beene
„ had or made vntill the ſaid office bee lawfullie
„ vndon by trauers or otherwiſe. And that the
„ other lord and lordes, of whom anie ſuch ma-
„ nours, landes, tenementes, or hereditamentes,
„ ſhalbe holden by knightes ſeruice, as is afore-
„ ſaid, ſhall haue their remedie in ſuch caſes, for
„ his or their wardſhips of bodies and landes, by
„ write of right of warde, and ſhall diſtreine and
„ make auowrie or cogniſaunce, by themſelues
„ or their baliſes, for their releefes, heriots, and o-
„ ther profits, which ſhould haue beene to them

due

due, by or after the death of their tenaunt, as if „
no ſuch eſtate or conueiaunce had bene had or „
made. Sauing and reſeruing alwaies, by the au- „
thoritie aforeſaid the right and title of the do- „
nees, feoffees, leaſſees, and deuiſees thereof, a- „
gainſt the ſaid deuiſour and his heires, after the „
intereſt and title of the king or other lord ther- „
in ended and determined. „

Prouided alwaies that this acte, explanati- „
on, and declaration, or anie of them, or anie „
thing in this ſaid acte, explanation or declarati- „
on contained, ſhall not extend to the wil or de- „
uiſe of ſir Iohn Gaynsforde, late of Crowherſt „
in the coũty of Surrie knight deceaſed: Nor to „
the will or deuiſe of ſir Peter Filpot knight de- „
ceaſed: Nor the wil or deuiſe of Richard Creſ- „
wel late of Mattingley in the countie of South. „
gentleman deceaſed, nor to the will or deuiſe „
of Thomas Vnton late of the countie of Berk. „
gentleman deceaſed, ſonne of ſir Thomas Vn- „
ton knight alſo deceaſed: or ſhal be in anie wiſe „
preiudiciall or hurtfull, to anie perſon or per- „
ſons, for or concerning anie manours, landes, „
tenements, or hereditaments, conteyned or ſpe „
cified in the ſaid willes or deuiſes, or in any of „
them, but that the ſaid laſt willes and deuiſes, „
and euery of them, ſhall ſtande, abide, remaine, „
and be, in the ſame caſe, force and effect in the „
law, to all intents, purpoſes and conſtructions, „
as the ſaid laſt willes and deuiſes, and euerie of „
them, were before the making of this act, decla- „
ration, and explanation, and of none other ef- „
fect or force: this act, declaration, & explanatiõ, „

or

„ or anie of them, or anie thing therein contai-
„ ned to the contrarie thereof in anie wiſe not-
„ withſtanding.

„ Prouided alwaie, and bee it enacted by the
„ authoritie aforeſaid, that all and euerie perſon
„ and perſons from whom the king or other lord
„ or lordes, ſhall take anie manours, landes, tene-
„ mentes or hereditamentes for his or their full
„ thirde part, or to make vp his or their third part,
„ ſhall and maie, by authoritie of this preſent act,
„ in anie of the caſes aforeſaide vpon his or their
„ bill exhibited in the kinges courte of Chaun-
„ cerie, againſt al and euerie ſuch perſon and per-
„ ſons, which ſhall be entitled by or vnder anie
„ ſuch will, gifte, diſpoſition or deuiſe, to the o-
„ ther two partes, haue ſuch contribution or re-
„ compence for the ſame, as by the chancellour
„ of England, or by the keeper of the great
„ ſeale of England for the time being,
„ ſhall be thought good and
„ conuenient.

Of the deuiſe of goods and Chattelles.

1 *All manner of goods and chattelles may be deuiſed by will, certaine caſes excepted.*
2 *The rule of the deuiſe of landes contrary to the rule of diſpoſing of goodes.*

§.v.

COncerning the ſecõd kind of thinges deuiſeable by teſtament, namelie goods & chattelles; this may be deliuered for a rule: That all manner of goods and chattelles, maie be bequeathed or deuiſed by will or teſtament [a], certaine caſes onelie excepted [b].

Which rule is cleane contrarie to the former of the deuiſe of lands, tenementes, and hereditamentes; for they can not be deuiſed, ſauing where ſome cuſtome, or ſtatute hath gained libertie, of bequeathing or deuiſing of the ſame [c]: But here in ſteede of the Negatiue rule, is ſet downe the Affirmatiue, the exceptions of which rule are proſecuted in the next Paragraphe.

a. L. cætera. ff. de leg. 1. §. tam corporales. Inſt. de legat. & ibid. DD. Lindw. in c. ſtatutum. de teſta. lib. 3. prouinciał. conſtituc. Cant. Perkins. tit. deuiſe. c. 8. fol. 99.
b) De quibus. §. prox.
c) Vt ſupr. ead. part. §§. 2, 3, 4.

Diuers kindes of goodes, not deuiſeable by will.

1 *Goods which a man hath iointlie with an other, can*

can not be deuiſed by will.

2 What if the other ioint-tenannt be made Executor whether is the bequeſt good?

3 Goods which a man hath as adminiſtratour, cannot be giuen by will.

4 Euerie adminiſtrator accomptable to the ordinarie.

5 Difference betwixt the executor, and the executor of an adminiſtrator.

6 Goods of the realme, that is to ſaie, of the auncient crowne and iewelles, can not bee giuen by will.

7 Goodes belonging to a church or hoſpitall, can not be deuiſed.

8 Goodes belonging to a citie, boroughe or communaltie, can not be deuiſed.

9 Church goodes can not be deuiſed.

10 Things which deſcend to the heire and not to the executor, are not deuiſeable by will.

11 Whether the corne growinge vpon the grounde, whereof a man is ſeaſed in right of his wife, be deuiſeable?

12 Whether corne on the ground be deuiſeable by the leſſee, the leſſor being ſeaſed in right of his wife.

13 Corne growing deuiſeable by the tenaunt, by the curteſie of England.

14 Corne growing deuiſeable by the tenaunt in dower.

15 Whether corne growing on lande morgaged, bee deuiſeable?

16 Whether corne growing, maie be deuiſed by the teſtators daughter, where a ſonne and heire is afterwardes borne, or wherein the mother dooth recouer her dower?

17 *The teſtator cannot bequeath that which is an other mans.*

§.vj.

FIrſt a man can not giue or bequeath by wil any of thoſe goods or catelles which he hath iointlie with an other, for if he ſhould bequeath his portion thereof to a third perſon, this bequeſt is voide by the laws of this realme[a], and the ſuruiuor, which had thoſe goodes or cattelles iointlie with an other, ſhal haue that portion ſo bequeathed notwithſtanding the ſaid will[b]. In ſo much that if the teſtator make the other iointenaunt his executor, againſt the which executor, an action is commenced in the eccleſiaſticall courte in a cauſe of legacie: neuertheleſſe the executor is not to be adiudged to poſſeſſe the ſaid goodes as executor, or by right of the will, but by the title and right of the ſuruiuor[c], and ſo the executor is to be diſmiſſed, and the will in that reſpect to be iudged voide[d].

a) Perkins.tit.deuiſe. fol.101.Doct.& Stud. lib.1.c.6.licet ius ciuile contrarium dictet.L. cùm alienum.C.de legatis.

b) Hoc verum iure regni noſtri Angliæ.Doct. & Stud.lib.2.c.25.ſecùs iure ciuili, vt latè per Olden.de action. claſſ.4.action.pro ſocio

c) Doct.& Stud.lib.2. c.25.

d) Vide ſupr.eod.part. §.3.n.8.

Secondlie, an adminiſtrator can not make a teſtament of thoſe goods which he hath as adminiſtrator, to anie perſon dying inteſtate[e], becauſe he hath not anie ſuch goodes to his own proper vſe[f], but ought there withall to paie the debtes and legacies of the dead perſon, and to diſtribute the reſt, (if anie thing doe remaine) in Godlie and charitable vſes[g], and for that cauſe, euerie adminiſtrator is accomptable to the

e) Brook tit.adminiſtrator.n.7.Fitzherb. eod.tit.n.3.

f) Plowd.in caſ.inter Bransby & Grantham. fol.525.526.

g) c ita quorundam. de teſtam.lib.3. prouinci. conſt.Cant.ſtat.Ed.3. an 31.c.11.

the ordinarie for ſuch diſtribution of the goods of the deceaſed, committed to his adminiſtration[h]. And albeit an executor of an executor maie adminiſter the goodes of the former teſtator[i]: yet the executor of an adminiſtrator can not adminiſter the goodes of the former deceaſed, but a new adminiſtration is to be cõmitted by the ordinarie of all the goods vnadminiſtred, by the late adminiſtrator, as if he had alſo died inteſtate; any teſtamẽt or aſſignatiõ of an executor by him notwithſtãding[k]. By this thẽ it appeareth, that the authority of an executor is greater then of an adminiſtrator: for an executor maie appointe an executor to the firſt teſtator, ſo can not an adminiſtrator: Howe be it an executor can not giue awaie the goodes of the teſtator in his will by legacies, no more then an adminiſtrator[l], for thoſe goodes are not the proper goodes of the executor: but are to bee imploied for the behoofe of the teſtator[m]; and in that reſpecte alſo is the executor accomptable to the ordinary as wel as th'adminiſtrator[n]; I meane of a bare & mere executor, of whoſe diligence the teſtator made ſpecial choiſe, to whõ nothing is bequeathed in the ſaid teſtament.

Thirdlie, by the opinion of diuers iuſtices of this realme, and doctors of the cannon and ciuill lawe, the goodes of this realme, that is to ſaie, of the auncient crowne, and iewelles, cannot be diſpoſed by will[o], as is aforeſaid[p].

Fourthlie thoſe thinges, which belong to anie colledge or hoſpitall, can not bee deuiſed by the teſtament or laſte will of the maiſter of the

h) d. Stat. Ed. 3. an. 31. c. 11.

i) Stat. Ed. 3. an. 31. c. 25.

k) Brook. Abridg. tit. adminiſt. n. 7. Principall grounds. fol. 61.

l) Plowd. d. caſ. inter Bransby & Grantham.

m) c. ſtat. de teſta. lib. 3. prouincial. conſtit. Cant.

n) Eod. c. ſtatutum.

o) Fitzherb. Abridg. tit. exec. n. 108.

p) Supr. part. 2. §. vlt.

the ſayde Colledge or Hoſpitall[q]. The ſame maie bee ſaide of a Maior of anie citie or borough, for hee can not by his teſtament, bequeath anie thing belonging to the citie, borough or comminaltie[r], no more then a maſter of a colledge or hoſpitall, ſuch thinges as he hath in right of the colledge or hoſpitall[s].

Fiftlie, the goodes of the church can not be deuiſed by teſtament[t]: But the corne growing vpon the glebe[v], and certaine other goods may be bequeathed, as hath beene before declared[x].

Sixtlie, thoſe thinges which after the death of the teſtator, deſcende to the heire of the deceaſed, and not to his executor, can not bee deuiſed by teſtament[y], except in ſuch caſes, where it is lawfull to deuiſe landes, tenementes, or hereditaments. And therefore if a man ſeaſed of landes in fee or fee taile, bequeath his trees growing vpon the ſaid lande at the time of his death, this deuiſe is not good except as before: but if hee deuiſe the corne growing vpon the ſame lande at the time of his death, from the heire to ſome other perſon, this deuiſe is good, albeit the land whereupon it groweth bee not deuiſeable: the reaſon of the difference is, becauſe the trees are parcell of the free-hold, and deſcend together with the lande to the heire and not to the executor: but it is not ſo of corne, for the ſame ſhall goe to the executor as parcell of the teſtators goodes. And therefore if a man be ſeaſed of landes in the right of his wife, and ſowe the lande, and deuiſe the corne

q) Perkins. tit. deuiſes. fol. 96. Doct. & Stud. lib. 2. c. 39.

r) Perkins. tit. deuiſe. fol. 96. §. non ſolùm. Inſtit. de lega. verſ. ſed ſi.

s) Perkins. vbi ſupra.

t) c. 1. de teſtam. extr.

v) Stat. H. 8. an. 28. c. 11

x) Supr. part. 2. §. penul.

y) Perkins. tit. deuiſes. à quo ſequentes caſus mutuatus ſum.

growing vpon the ſame lande, and die before the corne be reaped: in this caſe the legatarie ſhall haue the corne and not the wife: but it is otherwiſe of graſſe, and hearbes not ſeparated from the ground, at the time of the death of the teſtator. If a man ſeaſed in fee in right of his wife doe let the ſame lande for yeeres to a ſtraunger, and the leſſee ſoweth the grounde, and afterwardes the wife dieth, the corne not being ripe: In this caſe the leſſee may deuiſe the ſame corne, notwithſtanding his eſtate bee determined. So is it, if he that is tenaunt by curteſie of England of landes, tenementes or hereditamentes for his life, let the ſame lande to an other for yeeres, and the leaſſor die within the tearme of thoſe yeeres: In this caſe the leſſee maie deuiſe the corne which ſhall bee growing vpon the ſame lande, not ripe at the time of the death of the teſtator. Likewiſe if the tenante in dower, ſowe thoſe landes which he hath in dower, and make his executors, and after dieth, the corne not ſeparated, there the executors ſhall haue the corne, notwithſtanding the ſame be not ſeeded, and ſo the tenant in dower, may deuiſe the corne, growing vpō that land which ſhe holdeth in dower at the time of her death. But it is not alwaies lawfull for a man or a woman to deuiſe the corne by them ſowen, for if a man ſeaſed of lande in fee doe infeoffee a ſtraunger in morgage vpon paimente, and not paiment made on the partie of the feoffer, at a certaine daie: and the feofee ſowe the land, and the feoffer paie the monie at the daie appointed,

ted,and enter: in this caſe it is thought, that the feoffee cannot deuiſe the corne growing vpon the ſaid lande. Likewiſe if he that is tenaunte in taile of certaine land,doe let the ſame lande for terme of life,and the leſſee doe ſowe the ſame lande, and the tenaunte in taile die, and the iſſue do recouer the ſame in formdon in the diſcent before the corn be ſeparated: it is thought in this caſe that the iſſue in taile maie bequeath the ſame by his teſtament. Moreouer if a man ſeaſed in fee,haue iſſue a daughter and die, his wife being great with childe, and the daughter enter and ſowe the ground,and afterwarde before the corne be ſeuered,the wife is deliuered of a ſon, and thereupon his next freind do enter for him; yet the daughter maie deuiſe the corne growing vpon the ſame land: but if after the ſowing of the corne and before the birth of the ſon, the mother hath recouered her dower againſt her daughter,and the ſame land that is ſowen,is alotted or aſſigned vnto her by the Sherife,for her dower, in allowance of other lands,there the mother may deuiſe the corne, growing vpon the ſaide lande, and not her daughter.

Finallie,whereas by the ciuill law, it was lawfull for the teſtator to bequeath not onelie his owne thinges, but an other mans alſo[a]: in ſo much that the executor was compellable to redeeme the ſame thing,and deliuer it to the legatarie,or if the owner would not ſell it,then to paie the iuſte value thereof to the ſame legatarie[b],vnleſſe the teſtator were ignorant that the

a) §. Nō ſolum Inſtit. de lega L. cùm alienum. C. de lega.

b) Eod. §. non ſolùm. L. non dubium. ff. de lega. 3.

ſame thing did belong to an other, and did ſuppoſe it to be his owne: In which caſe the legacie is void, ſo that the executor is neither boũd to buie the thing, nor to paie the value therof[c], becauſe peraduẽture if the teſtator had knowen that it had been an other mãs, he wold not haue bequeathed the ſame[d]: yet neuertheles both by the laws eccleſiaſtical[e], & alſo by the laws of this realm[f], no mã can bequeath or deuiſe any thing by his teſtament or laſte will, ſauing onelie that which is his own, and that which he hath to his proper vſe[g]; and if hee do bequeath anie other mans, the bequeſt is void; ſo that the executor is neither bound to redeeme the thing for the legatarie, nor to pay the value thereof[h]; and that without diſtinction, whether the teſtator did know or not know, whether the thing bequeathed were his own, or an other mans[i]. But what if the teſtator do bequeath ſome thing, which at the time of the making of the teſtamente is not his, but the teſtator afterwardes dooth buy the ſame: Whether is this thinge due or recouerable by the legatarie yea, or naie? By the ciuill lawe it is not due[k], but in ſome fewe caſes[l]. By the lawes of this realme it ſeemeth that we are to diſtinguiſh, whether ſome ſpeciall thing be deuiſed or not; for if a ſpecial or certain thing be deuiſed, as if the teſtator doo bequeath the manour of Dale, then albeit the teſtator had no ſuch manor when the wil was made: yet by the purchaſe made afterwards, the teſtator is preſumed to haue had this meaning from the beginning, to purchaſe the ſame for the benefit of the lega-

c) d. §. non ſolùm. L. ſi vnum. §. ſi rem. ff. de lega. 2.
d) d. §. non ſolũ. Inſtit. de lega.
e) c. filius. de teſta. extr. & ibi Couar. in fin. Panor. in repe. c. cùm eſſes. eod. tit n. 18 Bar. tract. de differentijs inter ius can. & ciuil. n. 86.
f) Plowd. in caſ. inter Bransby & Grantham. huc etiam pertinent quæ ſuperiùs ſcribuntur in initio huius §. de coemptore, ſeu condomino diſponente.
g) Plowd. vbi ſup.
h) Couar. Panor. Sichard. vbi ſupra.
i) Si enim ignoraſſet rẽ eſſe alienam, tunc vel ciuili iure non valet legatum. §. non ſolùm. Inſtit. de lega.
k) L. 1. ff. de regul. Catõ.
l) Repertor. Bertachini. verb. regula. Caton.

legatarie, and ſo the deuiſe is good[m]. But if the legacie be not ſpeciall but generall, as if the teſtator doo bequeath all his landes, then the teſtator hauing ſome lands at the time of making the teſtament, and purchaſing other lands afterwardes, theſe landes purchaſed after the making of the teſtament ſhal not paſſe[n]. But howſoeuer the lawes of this realme haue determined concerning the deuiſe of lands, tenements and hereditaments, purchaſed after the making of the teſtament: yet concerning goods, if the teſtator doo bequeath anie ſuch thing in generall tearmes, as a horſe or an oxe, although the teſtator haue neither horſe nor oxe at the time of his teſtament made, neither yet at the time of his death, the legacie is not therefore voide[o], but the executor is bound to deliuer an horſe, or an oxe, as elſe where is confirmed, where alſo is ſhewed to whom the choice belongeth in this caſe, and what manner thing is to be deliuered[p].

m) Plowd. in caſ. inter Bret & Rygden. fol. 344

n) Plowd. vbi ſupra.

o) Bar. Paul. de Caſtr. & al. j. in L. legat. generaliter. de leg. 1. ff.

p) Infr. part. 7. §. x.

Of Aſsigning tutors, and diſpoſinge of childrens portions, during their minorities generallie conſidered.

1 *Manie queſtions about the tuition of children.*
2 *The matter of tuitions both large and vncertaine.*

§. vij.

IF I ſhould vndertake to ſpeake fullie of the aſſignement, or appointinge of tutors to children, and cuſtodie

of their portions or other rightes during their nonage, not onelie manie queſtions would offer themſelues to be handled, (namelie who maie graunt the tuition, of whom, to whom, after what manner, what is the office and authoritie of a tutor, when the tuition is finiſhed, what action the pupill hath againſt the tutor for the recouerie of his rightes, or the tutor againſt the pupill for the charge of his education and conſeruation of ſuch thinges as are due to the childe; and finallie if the tutor teſtamentarie excuſe him ſelfe, or refuſe the tutorſhip, what order is to be taken in the behalfe of the child,) which queſtions are ſo ample & miniſter ſo great aboundance of matter, that it is not poſſible to comprehend the ſame within anie compaſſe fitte for this breefe treatiſe. And further the cuſtomes of this realme are ſo diuers and contrarie one to an other, which doe concerne this matter, that I might eaſilie fall into diuers errors.

Wherfore as well for that this matter ſhould not exceed the proportion of a iuſt member, as alſo for that I would be loath to play the blinde guide, I thought it better, and more ſafe, to refer the Reader to the learned of euery place, of whom he may be more ſufficiently certified of their particular cuſtomes, then to fill vp this volume with the multitude of different; yea and contrarie obſeruations, of ſundrie countries, and places within this Realme, whereof I can obteine no ſounder warrant nor better aſſurance of the legalitie thereof, then the bare reports

ports, and relations of others.

Howbeit, foraſmuch as within the Prouince of Yorke, I my ſelfe haue had ſome reaſonable experience in theſe affaires for many yeeres, I thought it not amiſſe briefly to ſignifie what is there obſerued.

Of the committing of the tuition of children, and cuſtodie of their portions, within the prouince of York.

1 *No parents of any Countrey haue like power ouer their children, as had the Romanes.*
2 *Whence the authoritie of aſsigning children, did deſcend.*
3 *The cuſtomes of the North parts of this Realme, doe very much reſemble the Ciuill lawe.*

§. viii.

ALbeit neither within this Realm of England, nor within anie realme chriſtian, anie parents haue the like power ouer their childrē, as had the Romans [a]; to whō alone that *patria poteſtas* was proper and particular [b]; which was the cheefe cauſe wherby they did & might by their teſtamentes, commit the bodies of their children, and their portions at their pleaſures to the cuſtodie of others according to the ciuill lawe [c]: yet in diuers places within this realme, and namelie throughout the prouince of Yorke, there

a) §. Ius autē. Inſtit. de tutelis. & ibi gloſſa in qua enumerātur ſeptē aut octo in quibus ius patriæ poteſtatis conſiſtit.
b) Eod. §. neenon tract. de repub. Angl. lib. 3. c. 7. Intellige tamen vt in gloſſ. in d. §. ius autē.
c) L. 1. ff. de teſta. tutel. §. permiſſum. Inſtit. de tutel.

there dooth remaine a certaine reſemblance of that power and determination of the ciuil law; as in manie other things, ſo alſo in the aſſigning or appointinge of tutors by their teſtaments or laſt wils [d], whether we regard the perſon of the teſtator or of him that is aſſigned tutor, or of the children, or the maner of aſſignation, or the office and authoritie of the tutor, or the meanes wherby the tuition is ended, which I muſt onelie point at.

d) Vt patet ex his quæ ſubſequuntur §§. 9.10,11,12,13,14.

Who maie appoint a Tutor.

1 *The father maie appoint a tutor, by his teſtamente or laſt will.*
2 *Whether the mother maie appoint a tutor.*
3 *Whether a ſtraunger maie aſſigne a tutor.*
4 *Whether the ordinarie maie aſſigne a tutor.*

§.ix.

VNderſtand therefore that by generall cuſtome obſerued within the prouince of Yorke [a], the father by his laſt will or teſtament maie for a time commit the tuition of his childe, and the cuſtodie of his portion [b], for within that prouince, children haue their filial portions of their fathers goods according to the ciuill lawe [c], except he be heire, or aduaun-

a) De qua conſuetudine apertiſſimè, per indubitatæ fidei acta & inſtrumenta antiqua, in archiuis Archiepiſcopi Eborac. repoſita, conſtat.

b) Fatetur quidem noſtratium liberos ab illa prima poteſtate ferè ſolutos, & quaſi emancipatos eſſe, vt refert D. Smith in ſuo tract. de repub. Angl. Quin tamen hæc conſuetudo, quæ vel præcipuè in partibus borealibus viget, ſumma nitatur æquitate & ratione, negari non poteſt. Quis enim diligentiùs de pupilli rebus cogitat quàm parentes? aut cui maiori curæ eſſe poterit, vt ex eo maximè quantiuis nulla alia ſubeſſet cauſa, ijs liceret morientibus, in teſtamentis ſuis deſignare liberis vice parentes eos, quorum experta fide norunt futuros eſſe liberis ſuis tutores, id eſt, tutores, ſiue defenſores. (c) Et quidem debetur eadem prorſus quantitas, nam vt quandoque triens, quandoque ſemis competit. (auth. nouiſſimo C. de inoffic. teſtõ) pro numero liberorum. ita iure quo nos vtimur, media pars debetur liberis, nulla relicta vxore, quâ ſuperſtite, tertia pars bonorum ijs competere dignoſcitur. infr. ead. part. §. 16.

ced

ced in the life time of his father[d], which teſtament and aſſignation is to be confirmed by the ordinarie[e], who alſo is to prouide for the execution of the ſame teſtament[f].

If the father die, no tutor being by him aſſigned, and the mother doo in her laſt will and teſtament appointe a tutor, the ſame will is to be prooued, and the aſſignation of the tutor confirmed[g].

And if no tutor be aſſigned by either of the parents, then maie a ſtranger if he make the Orphane his executor, and giue him his goodes, aſſigne a tutor vnto him[h], which tutor is by the ordinarie to be confirmed[i].

And if there be no tutor teſtamentarie at all, then maie the ordinarie commit the tuition of the childe to his next kinſe-man[l] demaunding the ſame, according as in adminiſtratiõs where anie dieth inteſtate[m], ſo that the childe be not warde, for then the ordinarie maie not diſpoſe of the cuſtodie of his perſon, as is hereafter declared[n].

d) Vide infr. ead. part. §. 16.

e) Id quod iuri ciuili conſonat ſz ſi pater filio emancipato tutorem aſſignauerit omnino Iudicis ſententia confirmandus eſt. §. fin. Inſtit. de tutel.

f) Infr. part. 6. § j.

g) Confirmatur quidẽ tutor à matre datus, ſed cum inquiſitione propter fragile mulieris conſilium. Sufficit verò modica inquiſitio filius ſi inſtituatur, alias requiritur magna. L. mater. C. de teſta. tutel. L. 2. ff. de confir. tut. Bar. in L. naturali. §. ſi quęratur. eod.

h) L. patronus. ff. de confir. tit. nam qui inſtituit impuberem videtur eum eligere quaſi in filium. Et ipſe habetur loco patris. Bald. in d. L. ſi patronus.

i) d. L. ſi patronus.

l) De hac poteſtate teſtimonium non obſcurum perhibent omnia ferè acta & inſtrumenta tùm recentia, tùm antiqua, quæ in archiuis publicis Archiepiſcopi Ebor. fideliter cuſtodita. (m) Nam vbi ſucceſſionis emolumentum ibi reſidet tutelæ onus. L. 1. ff. de tutel. (n) Infr. ead. part. §. xj.

Who maie be appointed Tutor.

1 *He that cannot be executor cannot be tutor.*
2 *Whether he that is vnder age or lunatike maie bee appointed tutor.*
3 *Whether a woman maie be tutrix.*

§. x.

ANie perſon maie bee aſſigned tutor which is not forbiddẽ[a], who is forbiddẽ may appeare by that which is hereafter

a) Quando excipiuntur aliqui, reliqui proculdubio admittuntur. Nam firmat exceptio regulam in non exceptis. Dec. & Cagnol. in L. 1. de reg. iur. ff.

after ſpoken of an executor [b], for hee that can not be an executor can not be tutor [c].

He that is not 21. yeeres olde, or is not of perfect minde and memorie, maie be aſſigned tutor: but it is to be vnderſtoode that hee ſhall be tutor when he is of ful age, or when he doth returne to ſanitie of minde [d].

By the ciuill lawe a woman (the mother and grand-mother excepted) can not bee aſſigned tutrix [e]: but it is not obſerued as a law within the prouince of Yorke, where not onelie the mother and grand-mother are admitted, but other women alſo, albeit they bee married, and vnder the gouernement of their husbands [f].

b) Infr. part. 5.
c) L. teſta. §. de teſta. tutel.
d) § furioſus. Inſtit. qui tut. teſta. dari poſſ.
e) L. iure noſtro de teſta. tuit. ff.
f) Vt per acta & inſtrumẽta. d. ſcacarij Archiepiſcopi Ebor.

To vvhom a tutor maie be appointed.

1 *A tutor may bee aſsigned to him that is not* 14. *yeeres olde, and to her that hath not accompliſhed twelue.*
2 *After* 14. *and* 12. *he and ſhe maie chuſe their curators.*
3 *When the curator is to be confirmed.*
4 *A tutor may be aſsigned to the childe vnborne.*
5 *No tutor can be aſsigned vnto him that is warde by reaſon of his landes.*
6 *Neither to infants or idiots wardes.*
7 *Who ſhall haue the ward-ſhip of a childe that hath landes.*
8 *What the Gardian maie doo.*
9 *The hard eſtate of wardes.*

10 *All infantes wards, are not ſubiect to like conditions.*
11 *Who ſhalbe Gardian to the infante, which hath landes in ſocage.*
12 *Procheyn amie accomptable to the ward after his full age.*
13 *Idiots in the cuſtodie of the prince, whether the cuſtodie of an infant or ideote may be deuiſed by the teſtator.*

§.xj.

BY the ſaid cuſtome generallie obſerued within the prouince of Yorke, a Tutor maie be aſſigned to a boie at anie time vntill hee haue accõpliſhed the age of 14. yeeres, and to a wench vntil ſhe haue accompliſhed the age of twelue yeeres[a]. But after thoſe yeeres he or ſhe reſpectiuelie maie chuſe their owne curators, notwithſtandinge their fathers will[b]: but if they doo not elect anie other curator after their ſeuerall ages, then hee that is aſſigned in the will, is to bee confirmed curator to either of the ſaid children, albeit hee were aboue 14. yeeres, and ſhe aboue 12. when the wil was made[c].

A tutor maie alſo be aſſigned to a childe that is not borne[d]: likewiſe to an ideote, or him that is lunatike[e].

But all this which is here aforeſaid is to bee reſtrained, ſo that it be not to the preiudice of him that is a Gardian, or hath the wardſhip of anie

a) L. tutelæ. C. de teſta. tut. §. permiſſum. Inſtit. de tutel. tit. quibus modis tut finitur. Inſtit. in prin.
b) §. Item inuiti. Inſtit. de curator. L. diuus. §. curatores. ff. qui pe. tut. L. matris. C. cod. in fin. quam op. longæuus approbauit vſus.
c) L. tutelę. C. de teſta. tut. §. dantur. Inſtit. de cura.
d) §. cum autem. Inſtit. de tut.
e) §. furioſi. Inſtit. de cura. & licet huiuſmodi perſonæ, maiores ſint 25. annis erunt ſub curatione. d. §. furioſi. an hæc authoritas ſit penes teſtatorem, vel ordinarium, an ad regem ſpectet iure prærogat. Quære vt inf. in d. §.

anie infant or minor [f], or of anie idiote, by reason of anie landes, tenementes or hereditaments, belonging to such infant or idiote [g]. For by the common lawes of this realme of England, the lorde of whom the infant dooth hold his landes, so soone as the father dieth, hath the wardship and keeping of the heire, and thereby maie sease vpon the bodie of the warde and his landes [h], whereof also he maie take the profites, without accompt, so that he nourish and bring vp the warde [i]: And not that onelie, but also offering to his warde conuenable marriage, without disparagement before 21. yeeres, if it be a man, or 14. if it be a woman; if the ward refuse to take that mariage, he or she must paie the value of the mariage [k], which is commonlie rated accordinglie to the profites of his lands, which is a thing vtterlie condemned of some & greatlie lamented of manie, both graue and godlie; because of the insatiable couetousnesse of diuers in these daies [l], for that therby it commeth to passe manie times, that a free man and a gentleman whiles he is an infant, of slender discretion and lesse experience, destitute of his beste friende, that is to saie, his naturall father, and consequentlie subiect to the subtilties and importunities of his craftie and couetous Gailor, is bought and solde like a beast, to such as seeke to make most aduantage of him; and in the ende besides manie moe inconueniaunces, matched to my maisters daughter, sister, cosin, or some other female, to whom for her vertues and gentle conditions, if thine enimie shoulde

be

f) Habenti tutorem tutor non est dandus. §. interdum. Inst. de cura.

g) Stat. prærogatiuæ regis. c. 9. Fitzh. Breue de idiota inquirendo.

h) Tract. de repub. Ang. lib. 3. c. 5. per stat. de prærog. regis. an. 17. Ed. 2. c. 1. & 6.

i) d. tract. de repub. An.

k) Stat. West. c. 22.

l) Vide d. tract. de repub. Angl. lib. 3. c. 5. Termes of law. verb. gardein.

be preferred in mariage, thou couldeſt wiſhe him no greater tormẽt (if it were lawful for thee to wiſhe him anie torment) hell excepted.

To theſe perils are theſe infants ſubiect which holde landes of other by knightes ſeruice, called in french *Garde noble*[m], for there is an other kind of ſeruice, called *Gard Returier alias Gard in ſocage*, or tenure by the ploughe[n]. This wardſhip falleth to him that is next of kin, and can not inherite the lande of the warde[o], as the vnckle on the mothers ſide, if the land deſcend by the father; or the vnckle on the fathers ſide, if the land deſcend by the mother[p].

This Gardyan otherwiſe called *prochein amie* is accomptable for the profites and reuenues of the lande to the warde, as the tutor for the goods and chattelles to the pupill when he is of full age[q].

Concerning Idiottes ſuch is the prærogatiue of the princes of this lande, that they ſhall haue the cuſtodie of all the landes of naturall fooles, and maie take the profite thereof without waſte or deſtruction, of whoſe fee ſo euer the ſame be holden, findinge to them neceſſaries[r]: And after the death of ſuch Idiottes, the lande muſt be reſtored to the right heires[s]. But in the meane time, that is to ſaie, during the nonage of the warde, or during the life of the Idiote, the tuition of the bodie of the warde or Idiote, or of his landes can not bee deuiſed by teſtament, to anie other perſon contrarie to the courſe of common lawe, in preiudice of him to whom the wardſhip dooth belong[t], ſauing the teſtator

m) d. tract. eod. c. 5.

n) Eodem loco.

o) Stat. Marleb. c. 17. an. 52. H. 3.

p) Brook. tit. gardeins & prochein amye. n. 11 12. 13. Termes of law. verb. prochein amye.

q) d. ſtat. Marleb. c. 17. d. tract de repub. Angl. lib. 3. c. 5.

r) Stat. Ed. 2. de prærog. reg. c. 9.

s) Eod. ſtat.

t) Quia tutorem habẽti tutor non datur.

testator maie committe the custodie of suche goods and chattelles, as he dooth bequeath to the said infant or ideot, to whom hee will and during so long time as he will[v].

v)Siquidem vnusquisq; potest rebus suis quam velit legem imponere. Mantic.lib.7.tit.1.nu. 38.& testatoris voluntas habetur pro lege. L. seruus.ff. de manumiss. licet alias videatur per Fitzherb. Nat. Bre. de idiota inquirendo quòd bona quæ idiotæ obueniunt,suo gardiano accrescunt. Quære tamenper Stamford. sup d.prærog.reg.c.Idiot.

Of the manner of appointing Tutors.

1 *A tutor maie be appointed simplie or conditionally to a daie or from a daie.*
2 *The condition depending,what is to be doone in the meane time.*
3 *Lawfull to appointe one or manie tutors.*
4 *Whether where one tutor is appointed an other maie be receiued.*
5 *Whether diuers being assigned,one tutor alone may be admitted.*
6 *By what wordes a tutor maie be appointed.*
7 *What if the testator saie,I committe my children to thy power or to thy handes.*
8 *What if he saie, I committe my children vnto the quicke and deade.*
9 *What if he saie, I desire thee to take care of my son.*
10 *The testator maie vse anie language in the assignation of a tutor.*

§.xij.

BY the saide generall custome it is obserued within the prouince of Yorke[a], that a tutor maie bee assigned either simplie, or conditionallie[b],

a)De qua per plurima acta & testa. in d.sacro. existen.

lie[b], and vntil a certaine time, or from a certaine time[c]. But no tutor maie intermeddle as tutor, vntill he be confirmed by the ordinarie, albeit he be aſſigned tutor ſimplie[d], much leſſe where he is aſſigned conditionallie, or from a certaine time, maie hee intermeddle as tutor vntill the condition be extant[e], or the time limited be expired[f]: but the ordinarie maie in the meane time commit the tuition, and hee that is ſo appointed by the ordinarie, maie for that time adminiſter[g].

Moreouer it is lawfull to appoint either one tutor alone, or manie together[h]. Where one alone is appointed tutor by the teſtator, the ordinarie ought not to ioine an other tutor[i], vnleſſe he that is named tutor be lunatike[k], or bee abſent about the affaires of the cõmon wealth[l], for in theſe and other like caſes an other tutor maie be ioined[m]; at leaſte duringe the impediment. Where diuers are appointed, there one alone may adminiſter[n]: which concluſion doth proceede with leſſe difficultie, when cotutors can not or wil not meddle[o] or transferre their authoritie to him which dealeth[p], for they maie doo that, and ſo alſo be his ſureties[q].

It skilleth not by what wordes the tutor bee appointed, ſo that the teſtators meãing doo appeare: for they are neuertheleſſe to bee confirmed tutors[r].

Wherefore if the teſtator ſaie, I commit my children to the power of A.B. or I leaue them in his hands, it is in effect, as if the teſtator had ſaid, I make A.B. tutor to my children[s]: ſo it is if hee

b) §. ad certum. Inſtit. qui teſta. tutor dari poſſ.
c) Eod. §. ad certum. L. tutor. §. tutorem. de teſtaria. tut. ff.
d) L. legitimus & ibi Bar. ff. de legit. tutel.
e) L. qui ſub conditione ff. de teſta. tutel.
f) d. L. qui ſub conditione.
g) Bar. & alij in d. L. qui ſub conditione.
h) L. ſi plures. ff de teſta tut.
i) §. interdum. Inſtit. de cura.
k) L. non ſolùm. §. vlt. ff. de excuſ. tut. gloſſ. in d. §. interdum. Inſtit. de curator.
l) L. tutor. §. ſi quis abfuturus. ff. de ſuſpect. tut.
m) Gloſſ. & Minſing. in d. §. interdum. Inſtit. de cur.
n) L. 3. de adminiſt. tut. ff.
o) L. legitimos. §. in legitimis. ff. de legit. tut. L. 47. de adminiſt. tut.
p) Bald. in L. qui pupille. C. de negotijs. geſt.
q) L. Romanus. ff. de tutor. vel curator. dat. ab his.
r) L. 1. de confir. tut. ff. & ibi Bar. L. quoniam. C. de teſta. Socin. conſil. 83. vol. 1.
s) Iaſ. in L. manumiſſionis. ff. de Iuſtit. & iure. Boer. deciſ. 124. vbi atteſtatur hanc opinionem, & tutiorem, & veriorem eſſe.

he saie, I leaue them to his gouernement, regiment, administration &c[t].

If the testator saie, I commit my sonne to A. B. both quicke and dead with all his legacies by me giuen, by these wordes it is presumed that the testator meant, that A. B. should be tutor to his child if he liued, and if he died, then to haue those legacies[v].

If the testator saie, I desire my wife to take care of my children, during their minorities, albeit those wordes doo not necessarilie infer or conclude a tuition of their owne nature, but rather that she should chastice them, when they deserued to be corrected[x], (for to haue tuition of children is a greater thinge and extendeth further then to haue a care of them onelie[y]:) Neuertheless for as much as the ruder sorte of people, doe not know the difference of termes, nor the naturall force of wordes[z]: Therefore if any be assigned tutor by these foresaid words he is to be confirmed[a].

The same also maie be saide where the testator dooth commit his childe to the custodie of an other: For albeit, it be a greater thinge to haue the tuition of a childe, then to haue the bare custodie of a child committed vnto him[b]: Yet in all thinges the will and meaninge of the testator, is to be obserued and preferred before the propertie of the wordes[d], whereof perhaps he is ignorant, which meaning is to be collected by that which went before or folleweth after in the will, and by other circumstances, which the discreete iudge ought to enquire[e].

Finallie

t) Molin. in addic. ad Decium. in c. ex parte de app. extr. Socin. consil. 83. vol. 1.

v) Socin. d. consil. 83.

x) Dec. in d. c. ex parte de app. extr. Boer. decis. 124 in princ.

y) Dec. in d. c. ex parte.

z) Socin. d. consil. 83. vol. 1.

a) L. 1. de confir. tut. ff. & ita limitatur. §. quãq; in L. qui aliena. ff. de neg. gest. vt per Ias. in L. manumissiones. ff. de Iustit. & iur.

b) Rom. Sing. 164. Dec. in c. ex parte. de app. extr.

c) d. L. 1. de confir. tut. & DD. in eand. L. molin. in addic. ad lect. Decij in d. c. ex parte. M.

d) L. quoniam indignũ. C. de testam.

e) Boer. decis. 124.

Finallie, it skilleth not in what language the tutor be aſſigned, whether in Engliſh, Latine, Greeke, or anie other tongue[f].

f) L. vlt. C. de teſta. tut.

Of the office and auctoritie of a Tutor.

1 *The office of a tutor dooth principallie reſpect the perſon of the pupill.*
2 *The office of a tutor dooth ſecondarilie reſpecte the good adminiſtration of the pupilles goods.*
3 *The tutor ought to make an inuentarie and is chargeable with an accompt.*
4 *Whether a tutor ought to enter into bondes for the performaunce of his office.*
5 *Of the authoritie of a tutor.*
6 *Whether the tutor maie alienate the goodes of the pupill.*

§. xiij.

THe office and authoritie of the Gardyan or him that hath the wardſhip of any infant, by reaſon of anie lands, tenements or hereditamẽts, whether the ſame be holdẽ by knights ſeruice, or by ſoccage tenure is alreadie declared[a], wherefore in this place I ſhall onelie touch the office and authoritie of a tutor, according to the cuſtome obſerued within the prouince of Yorke, not greatlie differing from the diſpoſition of the ciuill lawe.

a) Supra ead. part. §. x. n. 8, 9.

This therfore is the office of a tutor. Firſte and principally to defend the perſon of his pupill [b], that is to ſaie, to prouide that hee bee honeſtlie and vertuouſlie brought vp, and to prouide for him meate, drinke, cloth, lodging, and other neceſſaries, according to the childs eſtate or condition and abilitie [c].

Secondarilie, the office of a tutor conſiſteth in the good and faithfull adminiſtring, or diſpoſing of the goodes and cattelles of the ſaide pupill [d], that is to ſaie, the tutor maie not commit anie thinge that maie bee hurtfull, nor omit anie that maie be profitable to his pupill [e]; and in the ende reſtore vnto the pupill all his goodes and cattelles, by him the ſaid tutor before receiued [f]. And for that purpoſe euerie tutor ought euen at the verie entrie into his office, to make a true inuentorie of al the goods and cattelles of his pupill [g]: and to make a iuſte and true accompt of his dealinges, in the behalfe of his pupill [h], and it is generallie obſerued within the ſaide prouince, that euerie tutor as well teſtamentarie, as other appointed by the ordinarie, dooth enter into bonde with ſuerties to the effecte aforeſaide, accordinge to the diſcretion of the ordinarie [i].

Concerning the authoritie of a tutor, aſſoone as he is confirmed, he maie ſeaſe vpon the bodie of the pupill [k], and maie likewiſe take poſſeſſion of all his goods [l]. And if anie doe conueie awaie the perſon of the ſaid pupill, hee maie be conuented and in the ende compelled to reſtore

b) Inde tutores quaſi tuitores, id eſt, defenſores, à tuendo, & defendendo appellantur, ſicut æditui dicuntur, qui ædes tuentur. §. tutores. Inſtit. de tutel. L. 1. ff. eod.

c) Nec tantùm aliméta præſtari debent pupillo, ſed etiam in ſtudia impenſæ debent impẽdi pro facultate patrimonij, & dignitate natalium. Wigand. Happel. tract. de tutel. tit. 138. n. 44. fol. 350.

d) §. datus. Inſtit. de excuſ. tut. & Minſing. ibidem.

e) Latiùs de offic. tutoris, Happelius tract. de tutel. tit. 38. per totum.

f) L. tutorem quendã. C. de arbitr. tut. Olden. de action. claſſ. 4. actiõ. tutel. directa.

g) L. tutor qui repertorium. ff. de adminiſtr. tut. L. tutores, vel curatores. C. de adminiſtr. tut. Bar. in d. L. tutor.

h) L. 1. §. offic. de tut. & ration. diſtrahend. ff.

i) Hoc vſitatiſſimũ eſſe infr. prouinc. Ebor. certo certius eſt, vtcunq; iure ciuili tutor teſtatorius, vel datiuus, ſatiſdare non teneatur. L. teſtamento. de teſta. tutel. L. 2. de confir. tut. ff.

k) Aymo. conſil. 18.

l) L. 1. ff. de adminſtr. tut.

ſtore him[m]. Likewiſe if anie perſon do detaine anie thing belonging to his ſaid pupill, recouerable in the eccleſiaſticall courte, hee is vſuallie conuented by the tutor in the behalfe of the pupill[n].

Furthermore the tutor maie alienate and ſell ſuch goodes belonging to the pupill, as can not be kept vntill he come to lawfull age[o]: but other goods which maie conuenientlie be kept, and continued vntill the pupill attaine to lawfull yeeres, and eſpeciallie goodes immoueable, the tutor maie not ſell nor alienate[p].

m) Gabr. lib. 5. com. cõclus. c. 1. n. 41. post Cas. consil. 120. Aym cons. 18. n. 6. fortè etiam incidit in sententiam excõmunicationis, quia impedit executionem testamenti. per c. statu. de testa. lib. 3. prouinci. constit. Cant. Fitzh. Nat. Bre. fol. 44.

n) Sed an debet agere, vel conueniri nomine tutorio. Bar. in L. 1. §. sufficit. ff. de admstr. tut. Brooke Abridg: tit. gard. el. a.

o) L. lex C. de admstr. tut.

p) Eadem L. lex. & ibi Angel. & alij.

By vvhat meanes the tutor-ſhip is ended.

1 *The tutor-ſhip is ended by diuers meanes.*
2 *In reſpect of pupill the tutor-ſhip is ended when he commeth to lawfull age.*
3 *Sufficient age in a man at* 21. *ſometimes at* 14.
4 *Sufficient age in a woman, at* 12. 14. 16. *yeeres in diuers reſpectes.*
5 *In reſpect of the tutor his office is ended, if he cannot be executor or doe excuſe himſelfe.*
6 *Likewiſe if he be remooued as ſuſpected, or become lunatike or deafe and dumbe, or be abſent or die.*
7 *Howe the tutor-ſhip is ended in reſpect of the forme of the tuition.*

§. xiiij.

THe tutor-ſhip is ended by diuers meanes, whereof ſome reſpecte the perſon of the pupill, ſome doe reſpect

the perſon of the tutor, and ſome doe reſpecte the manner and forme of the tuition it ſelfe [a].

In reſpect of the perſon of the pupill, the tutorſhip is finiſhed, when the pupill hath accõpliſhed ſufficient age. Sufficient age in a man is ſometimes at 21. yeeres and not before, ſometimes at 14 [b]. In a woman ſometimes at 12. ſometimes at 14. and ſometimes at 16 [c]. He that is warde by reaſon of landes holden in knights ſeruice is not out of ward-ſhip vntill hee bee of the age of 21. yeeres [d]: he that is ward by reaſon of lands holden in ſocage, is then out of ward-ſhip when he is of the age of 14. yeeres [e], at which yeeres hee maie refuſe his gardian, and call him to an accompt [f], at the ſame age alſo is the tutor-ſhip ended (if he haue no landes but goodes) and the minor maie then alſo call his late tutor to accompt [g]: and if he will hee maie then chooſe a curator, either the ſame perſon that was tutor or ſome other [h].

A woman aſſoone as ſhe is 12. yeeres of age, is out of the gouernement of her tutor [i], vnles ſhe be warde in reſpect of landes, for then ſhee ſhall continue warde vntill ſhee bee 16. yeeres olde [k], except ſhe be of the age of 14. yeeres at the death of her aunceſtors, for being of thoſe yeeres at her aunceſtors death, for as much as ſhe maie haue an husband able to doo knights ſeruice, ſhe ſhall not be warde [l].

In reſpect of the perſon of the tutor the tuition is ended, if he become ſuch a one, as cã not be made executor [m], of whom mention is made hereafter [n], or if he iuſtlie excuſe himſelfe [o]: (But thoſe

a) Vigel. method. iur. ciuil. part. 2. lib. 5. c. 8. Wigand. Happel. tract. de tutel. tit. 55. 56. &c.

b) Minor quibus caſib⁹ habetur pro maiore, vide Repertor. Bertachni. verb. minor. gloſſ. & DD. in c. ex part. de reſtituc. ſpol. extra.

c) Tract. de repub. Ang. lib. 3. c. 5. Principall grounds. fol. 35. Brook tit. gard. el. 2.

d) Mag. Char. c. 3. an. 9. H. 3. Bract. de leg. & cẽſ. Angl. lib. 2. c. 37. Brook tit. gard. n. 111.

e) Termes of law. verb. prochein Amy.

f) Marlebr. c. 17. an. 52. H. 3.

g) L. indecorum. C. cũ tut. eſſe deſin. Inſtit. quib. mod. tut. fin. in prin.

h) Supr. ead. part. §. x.

i) Inſt. quib. mod. tut. fin. in princ.

k) Brook tit. gard. el. 2. n. 7. Principal grounds. fol. 35.

l) Tract de repub. Ang. lib. 3. c. 5. Fitzh. Nat. Bre. fol. 141. D.

m) L. teſtament. de teſta. tut. ff.

n) Inſt. 5. part.

o) Inſtit. tit de excuſ. tut. l. 2. §. remittit. ff. eod.

thoſe lawes concerninge excuſinge of tutors and curators are verie ſeldome or not at all practiſed: for tutors now a daies are ſo far from excuſing themſelues, that on the contrarie they ſtriue and labour mightilie to bee admitted, turning that to a benefit, which was wont to be a burthen [p]) or if the tutor be remooued as ſuſſpected, the tuition is determined [q], (and he is ſaid to be a ſuſpected tutor which dealeth not faithfullie in his office [r]) or if the tutor become lunatike, or deafe and dumbe, or in that caſe, that hee can not gouerne or adminiſter his goodes [s], or if he die [t], or is abſent, being taken of the enemie [v].

In reſpect of the manner and forme of the tuition, the office and authoritie of the tutor is determined, as if the tutor bee appointed vpon condition, which condition is broken, or if the tutor bee appointed duringe a certaine time, which time is finiſhed [x], in theſe and manie other reſpectes (which for breuitie I omitte) the tutor-ſhip is determined [y].

p) Olden. in L. 12. tab. tit. 3. fo. (mihi) 55. Trac de repub. Ang. lib. 3. c. 5
q) L. ſi arrogati. §. pen. ff. de tut. §. pen. Inſtit. de ſuſpec. tut.
r) §. ſuſpectus. Inſtit. de ſuſp. tut. vel cur.
s) L complurima ff. de tutel. L poſt ſuſceptum de excuſ. tut.
t) L. Cuius bonis. C. de curator. furioſ.
v) L. ſi arrogati. ff. de tutel.
x) § præterea. Inſtit. quib. mod. tut. fin. L. ſi adrogati. §. ſed etſi. & §. fin. ff de tut.
y) Videāt Iuſtinianiſtæ Vigelij methodum iuris ciuilis, vbi perplures traduntur cauſæ finiendi tutelam.

Of the quantitie of landes deuiſeable by will.

1 *Of landes, tenementes, and hereditamentes, ſometimes all, ſometimes but two partes of three, is deuiſeable.*

§. xv.

NOwe that I haue ſhewed what kinde of thinges maie be deuiſed by will, it remaineth to ſhew how much is deuiſeable

uiſeable, of landes or goodes.

And firſt concerning landes, tenements and hereditamentes, ſometimes they maie be deuiſed wholie, as landes, tenementes and hereditamentes holden in ſocage, or of the nature of ſocage tenure [a]: ſometimes two partes of three maie be deuiſed, namelie of landes, tenements and hereditaments holden in cheef by knights ſeruice, or of the nature of knightes ſeruice in cheefe [b], as appeareth more fullie heretofore, where I haue ſet downe the ſtatutes at large.

a) Supr. eod. part. §. 4.

b) Eod. § 4.

What quantitie of goods or chattels maie be deuiſed by teſtament.

1 *Legacies to be paid out of the cleere debtleſſe goods.*
2 *The executor compellable to paie dettes out of his owne purſe, if he paie legacies firſt.*
3 *Funerall expenſes to be deducted out of the whole goodes.*
4 *The teſtator maie ſometime bequeath all his detleſſe goodes, ſometimes halfe, and ſometimes but a third part.*
5 *When halfe the teſtators goodes is due to the wife or children.*
6 *When the wife and children ought to haue either of them a third part.*
7 *Whether the wife and children ought to haue anie part of the dettes due to the teſtator.*
8 *Whether the wife and children maie claime anie reaſonable part of leaſes.*
9 *Whether the wife and children maie claime a reaſonable*

ſonable part of goodes, where there is no cuſtome.

10 *The reaſon of the lawe which leaueth all to the diſpoſing of the teſtator.*

11 *The reaſon of the cuſtome wherby the power of the teſtator is reſtrained.*

§.xvj.

COncerning the quãtitie of goods and chattelles to be diſpoſed, this is firſt to be noted, that the teſtator can not bequeath anie parte of the goodes, but where ſomething remaineth cleere, the moderate funerals, and the debtes due by the teſtator firſt diſcharged [a]. And therefore if the teſtator doo bequeath any legacies by his teſtament where his goodes and chattelles will not ſuffice to diſcharge his funeralles and debts, and the executor paie anie of thoſe legacies, before hee haue diſcharged the debts, by meanes wherof there is not ſufficient goodes lefte wherewith to pay the teſtators debtes: in this caſe the executor ſhall be charged with the payment thereof out of his owne purſe [b], as one that had otherwiſe waſted the goodes of the teſtator [c].

This then being vnderſtood that no legacie is due, but where there cleerlie remaine ſome

a) Bracton de legib. & cõſ. Angl. lib. 2. c. 26. n. 2. L. ſcimus. §. & ſi præfatam. C. de iure delib. In qua lege aſſignatur ratio quare legatarijs præferuntur creditores: nẽpe legatarij de lucro captando, creditores autem de damno vitãdo contendunt. d. L. ſcimus. Et licet hæres qui inuẽtario legitimè confecto, legatarijs ſatisfaciat, ſecurus ſit iure ciuili aduerſus creditores, quibus eodem iure conceſſum eſt actionem intentare, non contra hæredem, ſed contra legatarios. Longè tamen aliter iure noſtro, cautum eſt, quo non legatarios, ſed ipſum executorem conuenire permittitur, vt ſtatim ſubijcitur.

b) Fitzherb. Abridg. tit. deuiſe. n. 1. Brook. tit. adminiſtr. n. 37. Perkins. tit. deuiſe. fol. 109.

c) Doc. & Stud. lib. 2. c. 11. quam concluſionẽ facile admitterem, cõſcio executore æris alieni. Sichard. in d. §. & ſi præfatam. verb. 3. vtilitas. & Minſing. in §. ſed noſtra. Inſtit. de hæred. qual. & diff. n. 12. Cæterùm quod nonnulli ex noſtratibus eandem concluſionem extendunt, vt locum habeat vel ignorante executore, alios eſſe creditores: An iſtud verum ſit dubito, durum eſſe non inficior. Et quidem ſummus Iuſticiarius Brook oppoſitam ſententiam tenet, niſi vbi principi quid ſit debitum, quia regia debita ſuo periculo ſcire debet. Brook. tit. exec. n. 116.

goodes and cattelles, the funeralles and debtes first deducted (for funeral expēces are to be deducted foorth of the whole goods both by the ciuill lawe [d], and by the lawes of this realme [e].) Thou shalt vnderstande that of that which remaineth, sometimes the whole, sometimes the halfe, and sometimes the third part, maie be bequeathed or deuised by the testator, according to the diuersitie of these cases following.

d) L. sciimus. §. in computatione C. de iure delib.

e) Fitzh. Na. Br. fol. 121 Doct. & Stud. lib. 2. c. 10. Brook Abridg. tit. exec. n. 172.

The first case is, when the testator hath neither wife nor childe, at the time of his death, for then hee maie dispose all the residue of his cleare goodes and cattels at his pleasure [f].

f) Lindw. in c. statut. de testam. lib. 3. Quincial. constit. Cant. verb. defunctum. Bracton. de legib. & consuetu. Angl. lib. 2. c. 26. Tract. de repub Angl. lib. 3. c. 6. Fitzherb. Bre. de rationabil. parte bon.

The second case is, when the testator at the time of his death hath a wife and no childe, or else some child or childrē, but no wife. In which case by a custome obserued, not onely throughout the prouince of Yorke, but in manie other places besides, within this realme of England; the goodes are to be deuided into two partes, and the testator can not bequeath anie more then his part, that is to say, the one halfe, for the other halfe is due to the wife, or else to the children, by vertue of the said custome [g].

g) Lindw. Bracton. & Fitzherb. vbi supr.

The third case is, where the testator leaueth behinde him bothe a wife, and also a childe or children: In which case by the custome obserued in diuers places of this realme of England, and namelie within the prouince of Yorke: the testator can not bequeath anie more of his goods, then the third part of the cleere goods [h], for in this case the said cleere goodes are to be deuided into three partes, whereof the wife ought

h) Act. & computat. in scaccario Archiepiscopi Ebor. Lindw. Bract. & Fitzher. vbi supr.

ought to haue one parte, the child or children an other parte, and the third part (which is called the deathes part) remaineth to the teſtator, by him to be giuen or bequeathed to whō he thinketh good[h].

And here note that where the wife or children ought to haue a ratable parte of the goods of the deccaſed, be it a third parte or halfe as the caſe yeeldeth, there alſo they ought to haue a like parte of the debtes due vnto the teſtator after they be recouered by the executor or adminiſtrator, for then they are numbred or accompted amongeſt the goodes of the teſtator but not before[i]. But of leaſes the wife and children can not haue anie ratable parte within the prouince of Yorke, or other places, where they haue beene accuſtomed to haue their ratable parte of the moueable goodes and debtes recouered, vnleſſe the ſaide wife or children demaunding their ratable parts of leaſes, do proue that by ſpeciall cuſtome of that place, (namelie of that citie, countie, deanrie or pariſhe where the teſtator dwelled and had ſuch leaſes,) the wiues and children were accuſtomed to haue their ratable parte, as well of the leaſes, as of the moueable goodes of the teſtator, which ſpeciall cuſtome being prooued, they maie recouer their ratable part as before[k].

The fourth caſe is, when there is no ſuche cuſtome, of deuiding the goodes of the teſtator into two partes, or into three partes, as is before mentioned, in which caſe albeit ſome were of this opinion, that euen by the cōmon lawes

h) Lind. Bract. & Fitzh. in locis præd.

i) Brook Abridg. tit. exec. n. 112. Siquidem ſi iſta ex cōſuetudine tantum debentur, hac non probata, ſine difficultate illud procedet quod eſt iuri recepto magis conſonum.

k) Fitzh. in Br. de rationab. part. in quo Breuiſit mentio, non ſolùm bonorum, ſed etiam cattallorum. Atq; huc facit, quod habemus in Mag. Chart. c. 18.

lawes of this realme, the cleere mooue-able goodes were to be deuided into three parts or into two partes as before, whereof the wife and children were to haue their partes[l], and consequentlie that the testator could not dispose anie more thereof, then the halfe or third, being the deathes part. Neuertheless others (whose opinion hath preuailed) doo holde the contrarie, to wit that there is no such deuision to bee made by force of the common lawes of this lande, but onelie by force of custome[m], and cõsequentlie that it is lawfull for the testator, by the lawes of this realme (except in those places where the custome aforesaid is obserued) to dispose all the whole residue of his goodes, his funeralles and debtes deducted) at his likinge, and that the wife or childe can claime no more thereof, but accordinge as the testator shall deuise by his testament.

And in the opinion of some, the lawe of this lande which leaueth all the residue to the disposition of the testator, funeralles and debts deducted, seemeth to haue better grounde in reason, then the custome, whereby he is forced either to leaue two partes of three, or at leaste the one halfe to his wife and children[n]. For what if the sonne be an vnthrifte, or naughtie person, what if the wife be not onelie a sharpe shrowe, but perhaps of worse conditions? Is it not harde that the testator must leaue either the one halfe of his goods to that wife or child or more, for the which also peraduenture hee had labored full sore all his life? were it not more

l) In hac sententia stetit Glandeuile, antiquus huius regni iurisconsultus, motus per stat. de Magna Chart, c. 18. vt refert Fitzh. in d. Breui de rationab. part. bon. Brook Et per de rationab part: bo: sic enim post multã disputationem inquit. Et fuit dit pue. ley M. 31. Henr. 8. que ceo ad estre mise en vre come vn comen ley & nunq̃ demurr, & ideo videtur que ceo est le comen ley.

m) Fitzh. d. Br. de rationab. part. bonor. Brac. de legib. & cõsuet. Ang. lib. 2. 26. Tract. de repub. Angl. lib. 3. c. 6.

n) Bracton. d. lib. 2. c. 26

more reaſon that it ſhould be in the libertie of the father, or husband to diſpoſe thereof at his owne pleaſure? which when the wife and children vnderſtood, it might be a meanes whereby they might become more obedient, liue more vertuouſlie, and contend with good deſert, to winne the good will and fauour of the teſtator [o]. Theſe reaſons make for the teſtator, and for the equitie of the common law, which leaueth the whole reſidue to his diſpoſition.

But the cuſtome whereby the libertie of the teſtator is reſtrained is not without reaſon alſo. For where it is asked, what if the child be an vnthrifte, the wife worſe then a ſhrowe? So it maie be demaunded with like facilitie, what if the childe be no vnthrifte, but frugall and vertuous? what if the wife be an honeſt and modeſt woman? which thing is the rather to be preſumed [p]. But if it be not amiſſe to feare the worſt, then on the contrarie, what if the teſtator be an vnnaturall father or vnkinde husband? perhaps alſo greatly inriched by his wife, wheras before he was but poore, ſtandeth it not with as great reaſon that ſuch a wife and children ſhould be prouided for, and that it ſhoulde not be in the power of ſuch a teſtator, to giue all from them, or to beſtowe it vpon ſuch as had not ſo well deſerued it, and by that meanes ſet his wife & children a begging? ſurelie the cuſtome hath as good ground in reaſon againſt lewd husbands and vnkinde fathers, as hath the lawe in meeting with diſobedient wiues and vnthrifty children [q].

o) Hiſce rationibus vtitur Bracton in defenſionem iuris huius regni. d c. 26. cui adde Rebuff. in L obuenire de verb. ſignif. ff. fol. 682.

p) c. dudum. & c. vltim. de præſump. extr. Maſcard. tract. de probac. concluſ. 222.

q) Mediam viam elegit Iuſtinianus, tàm quoad vxorem, quàm quoad liberos. Nam quod ad vxorem attinet, iubet imperator illa bona reſtitui, quæ marito vel ab ipſa vxore, vel ab alio nuptiarum cauſa, nempe ad ſuſtinenda matrimonij onera donata fuere. L. 2. fol. matr. ff. Bar. in Rub. ſolu. matrim. ff. n. 21. quod autem attinet ad liberos iure ciuili, Aſſis nunc triens, id eſt, tertia pars totius patrimonij, nunc ſemis, ſeu dimidium aſſis pro legitima debetur. Auth. nouiſſimo. C. de inofficioſ. teſta. quæ quidem legitima gratis tantum liberis deberi intelligitur: nam ingratis nihil habet parens pro legitima relinquere. Claud. Battandier. tract. de legitima. c. 13.

If

If the teſtator doo bequeath more then he maie, which legacie is to bee preferred or what other courſe is to bee followed.

1 *If the teſtator bequeath more then the deaths parte, whether one legacie is to be preferred before an other?*

2 *Diuers opinions about this queſtion.*

3 *Firſt concerning this queſtion wee are to conſider, whether there be an inuentarie or not.*

4 *An inuentarie beeing made the legatarie neede not paie anie one whole legacie, where there is not ſufficient to paie the reſt.*

5 *Certaine caſes wherein an inuentarie being made, the executor is forced to diſcharge ſome legacies wholie, though there be not ſufficient goods wherewith to diſcharge the reſt.*

6 *If the executor paie to ſome legatarie his whole legacie, whether he thereby tie himſelfe to paie the reſt wholie alſo.*

7 *Whether the legacie beeing vnduelie paied, maie be recouered.*

8 *No inuentarie being made, how farre the executor is bound to paie legacies.*

§.xvij.

NOwe that we haue ſeene when the teſtator maie diſpoſe all the reſidue of his cleere goodes or halfe, or but the third part onelie: and what

what be the reaſons of enlarging or reſtraining of the libertie of the teſtator in that behalfe, for as much as it dooth often fall out in facte, that the teſtator dooth bequeath more by his teſtament, then he maie by lawe or cuſtome, that is to ſaie, more then the whole reſidue where hee maie diſpoſe all, or more then the halfe, where hee can giue but the halfe, or more then the third, where he can giue no more but the third. It ſhall not bee vnprofitable to examine which of the legacies are firſt to bee diſcharged, and namelie whether that legatarie which is firſte named in the will, ought to haue his legacie firſt anſwered before the reſt, and that he that is named in the ſeconde place to haue his legacie next, and ſo the third and fourth, vntill the deathes part be wholy ſpent, & then the reſt of the legataries to haue nothing: or whether the executor maie gratifie which of the legataries he will, without differēce whether he be firſt or laſt named in the will, or elſe whether ought euery legatarie to ſuffer defalcatiō, or ratable deduction from euerie legacie, to wit, frō the greater legacie the greater part, and from the leſſer legacie the leſſer part, proporcionably, ſo that the legacies doo not exceede the deathes part, and that the deaths part maie ſuffice to paie the legacies.

It ſeemeth by the opinion of ſome, that a ratable part is to be deducted, & taken from euerie legacie, and that it is not in the power of the executor to gratifie anie one legatarie to the preiudice of an other legatarie, whether he bee

firſt

first or last in the testament [a], but rather, if the executor paie to one legatarie his whole legacie, that then he bindeth himself to paie to the rest of the legataries their whole legacies also [b].

On the contrarie it seemeth by the opinion of others, that if the executor doe make an inuentorie, then it is in the power and choise of the executor, to paie to which of the legataries he will, his whole legacie [c]: like as it is in his choise to paie to which creditours hee will his whole debte [d], albeit he be not ignorant of other debtes, of the same nature [e], and that paiment being made accordinglie, and no assettes remaning in the hand of the executor, the legatarie hath no more remedie against the executor for his legacie, then hath the creditor for his debt, who by the lawes of this realme is vterlie excluded, and by which lawes it is lawfull for the executor, to gratifie which of the creditors he will [f], sauing in certaine cases elsewhere mencioned [g].

In which contrarietie of opinions this is first to be considered: whether the executor doo make an inuentorie or not.

If the executor doo make an inuentorie, according to the lawes and statuts of this realme, then hee neede not paie to anie legatarie his whole legacy [h], though he be first named in the will [i], (I meane where there is not sufficient, to aunswer to euerie legatarie his whole legacie) but maie retaine a ratable part, according to the proportion aforesaid [k]; sauing in certaine cases,

a) L. si quis testamento § apud Iulianum. ff. de leg. 1. & Iaſ. ibid. Paul. de castr. in L. scimus. §. legitimam creditorib. C. de iure delib.

b) In Auth. de hæred. & falcid. §. non autem. & ibi Bar.

c) L. scimus. §. & si præfatam. C. de iure delib. & ibi Iaſ. verb. tertia vtilitas. Plowd. in caſ. inter Paramor & Yard. his verbis: Si home deuise a A. 20. li. a B. 20. li. & a C 20. li. & fait son exec. & moruſt ayant biens forsq; al value de 20. li. Ore il est id election de executor, a queux de euxe Troyes il voyl payer lez 20. li. & sil payer a lune, lauter ne poyet cõtradire ceo, ne ad aſcun remedy pur son legacy. fol. 545.

d) d. §. & si præfatam.

e) Et hoc ita iure huius regni. vt infr. part. 6. §. 16. ſecus iure ciuili. vt eod. §. 16.

f) Do. & Stu. lib. 2. c. 10.

g) Infr. part. 6. §. 16.

h) Paul de Caſtr. in L. ſcimus. §. lma. creditoribus. C. de iure delib. Alex. in d. L. §. & si præfatam.

i) Iaſ. in L. si quis testa. §. apud Iul. ff. de leg. 1.

k) Immò iure ciuili legatarius partem indebite ſolutam reſtituere tenetur. Caſtrenſ. & Alex. vbi ſupr. vnde fruſtra poteſt executor falcidiam peteret, quod ſtatim reſtitueret. c. dolo. de reg. iur. 6. non tamen retinere. Spec. de Inſtr. edit. §. xij. n. 26.

where

whereof one is, when ſome ſpeciall thing is bequeathed, as the teſtators ſignet or his white horſe, which ſpeciall legacie, (as ſome doo deeme,) is to bee ſatisfied and paied wholie without diminution in reſpecte of anie other generall legacies, or of legacies which doe conſiſt in quantitie[l]. An other caſe is when the legacie is to be diſtributed in *pios vſus*[m]. An other is when the father doth bequeath ſome thinge to his daughter for her dower, or towardes her marriage[n]. An other is when the teſtator doeth bequeath anie thinge in ſatisfaction or recompence of ſome iniurie by him don, or of goods euill gotten[o], for thoſe legacies alſo are not to be diminiſhed by reaſon of other generall legacies, or legacies conſiſting in quantitie, the which ſhall remaine wholie vnſatisfied, rather then thoſe foreſaide legacies ſhall bee diminiſhed: and conſequentlie in theſe caſes it is not in the power of the executor, to gratifie anie other legatarie at his election[p].

Furthermore if the executor doo make an inuentorie, and afterwardes paie to ſome legatarie his whole intire legacie, yet is he not therby tied, to paie the reſt of the legacies wholie, (the deathes part not being ſufficient) and this is vndoubtedlie true, if the executor were ignoraunt of other legacies giuen by the teſtator[q], exceeding the deathes parte when he did paie the whole legacie[r]. But neither the executor nor anie other legatarie, can reclaime or recouer that ouerplus paide and deliuered to the handes of the legatarie, as vnduelie paide vnto him,

l) Iaſ. poſt Paul de Caſtr. in d. L. ſi quis teſto. §. apud Iul. quãuis non negé propoſitioné hanc non ſine difficultate procedere.

m) Caſtrenſ. in d. §. apud Iul.

n) Caſtrenſ. vbi ſupr.

o) Caſtrenſ. in d. §. Federic. de ſenis conſil. 243.

p) Paul. de Caſtr. in d. §. apud Iul. cuius conſilio hæc ſunt menti tenenda, quia (inquit) ſunt ſingularia.

q) Plowden in caſ. inter Paramor & Yardley. Quod verò Bar. ſcripſit quòd hæres ſubtiliter ſeu ſcienter vni legatario integraliter ſoluẽs, omnibus alijs in ſolidum ſoluere compellitur, omni penitus inc̃ſtantia amota, intelligendum eſt, ſine deductione falcidiæ, id eſt, quartæ hæredi debitæ. (Bar. in §. non autem. de hæred. & falcid. in Auth.) Nec enim dixit, neque profecto ſomniauit Bartolus hęredem compellendum ſoluere reliqua legata ſine diminutione legatorum, quæ ſuperant vires hæreditatis, facto ſcilicet inuentario. DD. in Auth. ſed cùm teſtator. C. ad L. falcid.

r) L. ſcimus. §. & ſi præfatam. C. de iure delib. & ibi gloſſ. ibidem.

him, in respect that there is not sufficient to pay all the reste of the legacies out of the deathes part[s].

If the executor enter to the testators goodes and will make no inuentarie thereof, then maie euerie legatarie recouer his whole legacie at his handes[t], for in this case the law presumeth that there is sufficient goodes to paie all the legacies, and the executor dooth secretlie and fraudulentlie substract the same[v], whereas otherwise the executor is presumed not to haue anie more goods which were the testators, then are described in the inuentarie, the same being lawfullie made[x].

s) Hoc verum iure quo nos vtimur, quo neque executori, neque legatario competat indebiti condictio, vel aliqua actio quæ sapiat eius naturam. Immo verò vel ipso iure ciuili, vt cunque creditoribus, vel legatarijs, per huiusmodi actiones subueniatur; at certe executori legis Falcid. vel Trebel. beneficium prorsus denegatur. Spec. de Instr. edit. §. nunc verò aliqua. n. 26.

t) L. scimus: C. de iure delib. facit. c. in literis. de raptor. extr.

v) Sichard. in d. L. scimus. §. & si præfatam, quod intellige nisi executor doceat de bonorum insufficientia, nam tunc licet non conficiat inuentarium, non tenetur vltra vires hæreditatis. Ias. in d. § & si præfatam. limita c. 4. Couar. in c. 1. de testa. extr. n. 15. De iure verò regni nostri, siue sit inuentarium confectum, siue non, creditor, seu qualiscunque petens, sufficientiam probet bonorum, vt videtur per Dyer. M. 6. Hen. 8. c. 3. & alibi. (x) Bald. & Sichard. in §. linia. d. L. scimus. & hæc opinio communis est, vt ait Franciscus Herculan. tract. de probac. nega. n. 256.

THE FOVRTH PART OF THIS TREATISE,

SHEWING HOWE OR IN what manner Teſtaments maie or *ought to be made.*

The Paragraphes or Chapters of the fourth part.

OF the formes of teſtamentes §.1.

Of the generall, ſubſtauntiall, forme of a teſtament §.2.

After how manie ſories an executor maie be made §.3.

Of a ſimple aſsignation of an executor §.4.

Of a conditionall aſsignation, or nomination of an executor §.5.

Of the effect of a conditionall diſpoſition §.6.

Whether euerie poſsible condition ought to bee obſcrued preciſelie §.7.

Whether the condition be accompted for accompliſhed in lawe, when it dooth not ſtand by the executor or legatarie, wherefore the ſame is not accompliſhed. §.8.

Whether he that is made executor, or to whom any legacie

gacie is bequeathed conditionallie, maie in the meane time whiles the condition dependeth, be admitted to the executorſhip or obteine the legacy by entring into bonds to perform the condition, or elſe to make reſtitution §.9.
Whether it be ſufficient that the condition was once accompliſhed, though the ſame doo not continue. §.10.
Of diuers conditions which maie ſeeme doubtful whether they be lawfull or vnlawful: And firſt of thoſe conditions whereby the libertie of making teſtamentes is hindred, how far the ſame are lawfull or vnlawfull §.11.
Of thoſe conditions whereby the libertie of mariage is hindered, howe far the ſame are lawfull or vnlawfull §.12.
Whether the prohibition or forbidding of alienation of the goods bequeathed be good or not §.13.
Within what time the condition maie or ought to bee performed, no certaine time being limited by the will §.14.
Of the vnderſtanding of this vſuall condition, (If he die without iſſue.) §.15.
What order is to be taken concerning the adminiſtration of the goodes of the deceaſed, whiles the condition of the executorſhip dependeth vnaccompliſhed §.16.
Of the making of an executor, to or from a certaine time §.17.
Of the making of an executor vniuerſallie or particularlie §.18.
Of making of executors by degrees §.19.
How manie maie be appointed executors §.20.

Of

Of those things which doe appertaine to the apparance of testamentes §.21.
Of the particular formes of testaments §.22.
Of the forme of a solemne testament §.23.
Of the forme of an vnsolemne testament §.24.
Of the forme of a written testament §.25.
Of the forme of a nuncupatiue testament §.26.
Of the particular formes of other testamentes or laste willes §.27.

IN VVHAT MANNER TESTAMENTES OR LAST WILLES ARE *to be made.*

The fourth part.

Of the formes of teſtaments.

1 *So manie ſeuerall formes of teſtamentes as there bee kindes.*

2 *Of teſtamentarie formes ſome be generall. ſome particular.*

3 *The generall forme of teſtamentes is two-fold eſſentiall and accidentall.*

§. j.

HEere followeth the fourthe principall part of this teſtamẽtary treatiſe: wherin I vndertook to ſhew how or in what maner teſtamentes or laſte willes maie or ought to be made.

For performaunce whereof I thought it cõuenient, first to deliuer certaine aduertisemẽts, and then to proceede.

The † first aduertisement is this, that as there 1
be diuers kindes of testamentes or laste willes (wherof heretofore [a]) so there be diuers formes of testamentes or last willes: for euerie kinde hath his seuerall forme, and euerie kinde differeth from an other by his forme [b].

The † next aduertisement is this, that albeit 2
euerie particular kinde of testament haue his proper forme peculier to it selfe [c]; neuertheless they haue also generall formes common to them all [d].

Wherefore before I speake of those particular formes, order requireth that I speake of the generall.

Of † which generall formes some doe respect 3
the *substance or inward essence* of the testamente, whereby that is made to be, which was not [e], and some doe respect the *outward appearaunce or proofe* of the testament, whereby that is made to appeare, which otherwise though it were shold not seeme to be [f].

a) Supr. 1. part. §§. 7, 8, 9, &c.
b) L. Iulianus §. si quis. ad exhibend. ff.
c) Supr. 1. part. §§. 7, 8. &c. & infr. eod. par. §. 22. cum reliq. vsq; ad finem
d) Vt infr. eod. §. & §. prox.
e) Bar. & Ias. in L. nemo ff de leg. 1.
f) Olden. de actiõ. class. 5. in prin. vbi tenet contra Bar. & alios, solennitatem testamentariam non esse de forma substantiali, seu essentiali, sed de forma probatoria. Cuius opinio haud dubie vera est, vbi solennitas non est de necessitate eiusdem, vt hic in Anglia Couar in c. cùm esses. de testa. extr. n 8. Minsing in §. sed cùm paulatim. in tit. de testa. ordin. n 4.

Of the generall substantiall forme of euerie Testament.

1 *The essentiall forme common to euerie testament, is the naming of an executor.*
2 *What it is to appoint an executor.*
3 *The naming of an executor is said to be the head of the testament.*

4 The

4 *The naming of an executor is also saide to bee the foundation of the testament.*

5 *No will properlie tearmed a testament, wherein no executor is named, albeit other legacies be left therin.*

6 *The effect of dying without or with an executor.*

7 *An occasion of further consideration concerning the making of an executor.*

§. ij.

1 HE generall, † substantiall, or essentiall forme common to euerie testament, is the naming or appointing of an executor [a], the which alone dooth make a testament, and without the which no will neither is, neither can be rightly tearmed a testament [b]. To † name or to appoint an executor, is to place one in the steede of the testator, who maie enter to the testators goods and cattels, and who hath action against the testators debters, and who maie dispose of the same goodes and cattelles, towards the paiment of the testators debtes, and performaunce of his will [c], which if he neglect to do, he maie be conuented by the said creditors, & legataries, so long as he hath assets in his hand [d].

a) L. 1. de hæred. Instit. L. 1. de vulg. sub. L. hæredes palam de testa. ff. nec obstat quod ius ciuile mentionem faciat de hærede, non de executore. Nam executores quales passim constitutos videmus in Anglia, ex omni ferè parte conuenire cum ijs, quos (nomen tantũ si excipias) ciuile ius appellat hæredes cõpertum est, ita, vt executor huiusmodi meritò vicehæres dici debeat. Quinimo & legistæ, & canonistæ omnes, illum pro hærede agnoscũt executorem, qui nullo alio instituto hærede deputatus est ad distribuendum bona defuncti in pios vsus. Bar. in L. nulli, C. de episcopis & cler. Zasi in L. precibus de vulg. sub. Ripa. in L. filiofa. de leg. 1. n. 21. ff. Panor. & Couar. in c. cùm tibi de testa. ext. Lindw. in c. statutum de testa. lib. 3. prouincial. const. Cant. verb. prius. Mantic. de coniect. vlt. vol. lib. 4 tit. 1. n. 7. (b) L. quod per manus. de iure codicil. Bar. & Iaſ. in d. L. nemo de leg. 1. ff. Idipsum Iaſin Rub. de leg. 1. qua etiam in re conspirant iura huius regni, vt per Brook his verbis: Alias citatis, & nunc denuò citandis. Nota per lez doctors del ciuil ley, & seriants del commen ley, si home fait son testament & nosme nuls executors, ceo nest testament, &c. Et alibi per Plowd. sub hac verborum forma: Sans testament home ne serra executor. Brook tit. exec. n. 20. Plowd. in casu inter Greisbrook & Fox. fol. 276. b. (c) Sichard. in Rub. de hæred. Instit. C. Termes of law. verb. executt. (d) Termes of law. verb. exec. & latiùs infr. part. 6. §. 3.

This † naminge or appointinge of an executor, is ſaid to be the head of the teſtament [c]. And as the bodie is dead which lacketh a heade, ſo the teſtament is as it were dead, wherein no executor is appointed [f]: it is alſo ſaid† to be the foũdation of the teſtament [g], wherefore as no building can ſtand without a foundation, ſo no *teſtament* can ſtande without the appointinge of an executor [h], neither can be properlie named a *teſtament*. And † although neuer ſo manie legacies or deuiſes be giuen, al thoſe legacies and deuiſes notwithſtanding ſuch diſpoſition maie be called a codicill, or a will, or otherwiſe tearmed, but certainelie *a teſtament*, it is not, neither can be properlie ſo named [i]: and therefore † he that made anie ſuch diſpoſition, ſhall bee deemed to haue died without a teſtament [k], and ſo the adminiſtration of his goodes to be committed to the widdowe or next of kinne, as of one dying inteſtate [l]: whereas on the contrarie, if an executor be appointed, ſuppoſe no other legacie be lefte nor deuiſe made, yet ſuch diſpoſition both is and maie be lawfullie and properlie ſaid to be a teſtament [m], whether the ſame *be ſolemne or vnſolemne, writ ten or nuncupatiue, priuiledged or vnpriuiledged* [n], and the perſon ſo diſpoſinge is called a teſtator [o]: and in this caſe the ordinarie can not commit the adminiſtration of the dead mans goods, as of one that died inteſtate; the executor being able and willing, to vndertake the execution of the teſtament [p].

Seeing † therefore, the force and efficacie of making

e) §. ante Inſtit. de lega. 3

f) §. imprimis. Inſtit. de hdercom. hæred. 4

g) d. §. ante. Inſtit. de lega.

h) d. L. quod per manus de iure codicil. ff. & DD. ibidem. Iul. Clar. §. teſtm. q. 5. n. 2.

5

i) Quippe legata ſunt accidentia quæ adeſſe, & abeſſe poſſunt, ſine ſubiecti (id eſt, teſtamenti) interitu. Iaſ. in Rub. de leg. 1. ff. Vaſq. de ſucceſſ. crea. §. xvij.

k) d. L. quod per manus. de iure codicil. ff. Inſtit. de hæred. quæ ab inteſtat. 6

l) Stat. H. 8. an. 21. c. 5.

m) L. 1. §. qui neque de hæred. Inſtit. ff.

n) Supr. part. 1. §. x.

o) Stat. Weſtm. 2. c. 23. an. 13. Ed. 1. ſtat. Ed. 3. an. 4. c. 1. & an. 25 c. 5. ſtat. 4. Brook & Fitzh. Abridg tit. execut. & tit. teſtam. omnibus in locis cum ſexcentis ſimilibus clare conſtat, teſtatorem & executorem teſtamentarium relatiuorum naturam ſapere.

p) Stat. part. 7. §. xix.

7

making of an executor is ſuch, as without the which no will or diſpoſition is, or deſerueth to bee tearmed, à *teſtament*, and without the which the partie deceaſed ſhall bee deemed to haue died inteſtate, notwithſtandinge the multitude of other legacies or deuiſes, and ſo adminiſtratiõ of the goods to be committed as is aforeſaid: It ſhal be therfore behooful to ſtep a litle further into the conſideratiõ of this matter, of making an executor, as the moſt excellent parte and foundation of euerie teſtament, and to ſhewe after howe manie ſortes an executor maie bee made [q], and what are the different effectes of euerie ſeuerall ſorte or manner of appointing an executor [r].

q) Infr. §. prox.

r) Infr. ead. part. §. 4.

After hovv manie ſortes an Executor maie be made.

1 *An executor maie be appointed ſimplie or conditionallie, from or vntill a time, directlie or indirectlie, vniuerſallie or particularlie, in the firſt degree, ſecond, third, &c. and one alone maie be appointed executor or manie.*

2 *After how manie ſorts an executor maie bee made, after ſo manie maie a legacie or deuiſe be giuen.*

§. iij.

1 AN † executor maie be appointed after diuers manners, eſpeciallie after theſe following. Firſt either *ſimplie* [a], *or conditionallie* [b]. Secondlie either

a) Infr. ead part. §. 4.
b) Infr. ead. part. §. 5.

c) Infr. ead. part. §. 17. ther *from a certaine time, or to a certaine time*[c].
d) Infr. ead. part. §. 18. Thirdlie either *vniuerſallie or particularlie*[d].
e) Infr. ead. part. §. 19. Fourthlie either *in the firſt degree, or in the ſe conde degree, or in the third degree, or in the fourth, &c*[e].
& laſt of al either *one* maie be appointed ſole ex-
f) Infr. ead. part. §. 20. ecutor, or *diuers* maie be appointed executors together[f], of which I meane to intreate ſeuerallie. But by the waie I would haue the reader to obſerue, that † as an executor maie be made di- 2
uerſlie, ſo a legacie maie bee giuen or a deuiſe made accordinglie, that is to ſaie, ſimplie or cõditionallie, from a time or for a time, vniuerſallie or particularlie, in the firſt, ſecond, or thirde degree, &c. and to one or manie, which order of ſemblaunce or imitation, if the diligent reader ſhall note (which thing is verie eaſie to be performed; for that which is ſaid of the one maie alſo be ſaid of the other, in euerie reſpect almoſt, ſauinge where I haue noted the difference) hee ſhall reape two benefites in one reading, and eaſe me of double labour.

Of a pure or ſimple aſsignation of an Executor.

1 *The cheefe pointes conſiderable about the ſimple aſſignation of an executor.*
2 *What is a pure or ſimple aſsignation of an executor.*
3 *Diuers examples of a ſimple appointment of an executor.*
4 *Whether is hee vnderſtood to be made executor to whõ the teſtator dooth giue* all, *or the* reſidue *of his*

his goodes.

5 It is not alwaies needefull to expresse this word executor, in making of an executor, namelie when the testators meaning is knowen.

6 Other examples of the former conclusion.

7 The generall legatarie is not alwaies vnderstood to be executor.

8 What if the words be indifferent either to make a testament or a codicill.

9 An executor maie bee made either by the proper motion of the testator, or at the interrogation of an other.

10 The testator must haue a firme purpose of makinge his testament, otherwise wordes are of no force.

11 It skilleth not of wordes, so that the meaninge appeare, neither in what part of the testament, the executor be appointed.

12 Of the effect of a pure or simple nomination of an executor.

13 Certaine cases wherein the mention of a condition dooth not make disposition conditionall.

14 Whether impossible or vnhoneſt conditions doo make the disposition conditionall.

15 Whether necessarie conditions make the disposition conditionall.

16 Conditions referred to that which is paste or present are not properlie conditions.

17 Conditions necessarilie vnderstoode doo not make the disposition condicionall.

18 The application of that which hath beene spoken of the assignation of an executor to a legacie or deuise.

19 Certaine cases of the deuise of landes wherein the mea-

meaning of the deuisour is preferred before the proprietie of wordes.

20 *The different effectes of a simple assignation of an executor and a simple legacie.*

21 *A legatarie maie not of his owne authoritie take his legacie, and what is the reason.*

22 *What remedie a legatarie hath for the obtaining of his legacie.*

23 *Certaine cases wherein the legtarie may of his own authoritie apprehend his legacie.*

§.iiij.

Oncerning † the pure and simple making of an executor, I thought good to remember these points, viz: *what it is, in what forme of words* it maie be made, *what is the effecte thereof*, & finallie *how a simple nomination of an executor, and a simple legacie or deuise doo agree or differ.* 1

A † simple nomination or appointinge of an executor is, whē the testator maketh his executor without anie condition [a], as if the † testator saie, I make A.B. my executor, or thus, I institute A.B. my executor, or thus, I will that A.B. be my executor, or thus, I desire A.B. to bee my executor, or thus, A.B. shall be my executor, or thus, let A.B. be my executor [b]: For the lawe regardeth not so much the wordes, as the meaning of the testator [c]. And therefore if the testator saie, I commit all my goodes to the disposition of A.B. it is in effect as if he say, I make him 2 3

a) §. hæres. Instit de hæred. Instit. & Minsing. ibidem. Grass. Thesaur. com. op. §. legatum. q. 43. n. 2.

b) L. quoniam indignum. C. de testa. & DD. ibidem.

c) d. L. quoniam Mantic. de coniect. vlt. vol. lib. 4. tit. 3. Grass. Thesaur. com. op. §. Institutio. q. 14.

him my executor [d]: So it is if the teſtator ſaie, I commit my ſoule and all my goodes to the handes or diſpoſition of A.B. [e] or I make A.B. Lord [f] of all my goodes: or I make my wife ladie of all my goods [g], or I leaue all my goodes to A. B. [h] or I make A. B. legatarie of all my
4 goodes [i]: Or I leaue † the reſidue of all my goodes to A.B. [k] for in thoſe caſes he to whom all or the reſidue is bequeathed, is thereby vnderſtood to be made executor [l]. And this I ſuppoſe to bee true when it dooth ſufficientlie appeare by other meanes alſo, to be the meaning of the teſtator not to die inteſtate, but that he to whō all or the reſidue is bequeathed, ſhold immediatelie by vertue of the will, enter to all the teſtators goods, and (paying his debts and legacies
5 cies) retaine the reſidue to himſelfe [m]. For † it is not alwaies neceſſarie to expreſſe this worde (Executor) in making of an executor [n], neither hath euerie teſtator skill ſo to doo [o], wherefore it is ſufficient if the teſtators meaning doo appeare by other words of like ſence or purpoſe [p].
6 And † hence it is that if the teſtator write after this manner: In *all my goods mooueable and immooueable*, I make A.B. though the teſtator doo not adde executor, yet it is to be vnderſtoode, and ſupplied, and ſo is in effect as if the teſtator had ſaid, *In all my goodes mooueable and vnmooueable*, I make A.B. my executor [q]. Hence alſo is it that

d) Cùm tibi de teſta. extr. ſumma Roſella. verb. teſtm. §. j. verſ. quibus verb.

e) Io. de An. And. Barba. in d. c. cùm tibi. Brook Abridd. tit. executor. n. 98.

f) L. his verbis. ff. de hær. Inſtit.

g) Bald. in d. L. his verb.

h) Gloſſ. Bar. & Bald. in d. L. his verbis. Graſſ. Theſaur. com. op. Inſtitutio. q. 14. quem velim videas.

i) Mantic. de coniect. vlt. vol. lib. 4. tit. 3. n. 8. Bald. in L. id quod pauperibus. C. de epiſcopis & cler. n. 1. verb. contrarium.

k) Panor. in c. Ranutius de teſta. ext. n. 3.

l) Rationem aſſignat Panor. in d. c. Ranutius Quia (inquit) iuris imperiti neſciunt aptiùs loqui.

m) Quo caſu, nihil reor intereſſe, ſitné teſtamẽtum ſolenne, vel non ſolenne. Nam quod quidam volunt verbum (relinquere) adeſſe vniuerſitati bonorum in voluntate minus ſolenni importare fideicommiſſum, non inſtitutionem, actumque valere iure codicillorũ donationiſue cauſa mortis non teſtamenti

(vt in apoſtil. ad Panor. in d. c. Ranutius.) ita eſt intelligendum, quando teſtamentum aliàs non valeret. Bald. L. epiſtola. C. de fideicom. n. 4. Sichard. in L. fin. C. de codicil. n. 4. Couar. in d. c. Ranutius. §. j. n. 3. (n) c. cùm tibi de teſta. extr. Brook. tit. exec. n. 98. (o) Panor. in d. c. Ranutius. n. 3. (p) L. quoniam indignũ. C. de teſta. Mantic. de coniect. vlt. vol. lib. 4. tit. 3. q) Paul. Caſtrenſ. & alij in L. errore. C. de teſta. Mantic. de coniect. vlt. vol. lib. 4. tit. 3. n. 5.

if

if the teſtator ſaie, I will that A.B. be my executor, if C.D. will not: In this caſe C.D. is preſumed to be appointed executor: and maie if he will be admitted to the executor-ſhip, and exclude the other executor[r]. Likewiſe if the executor ſuppoſing his childe, brother, or kinſman, to be dead, do ſaie in his will; for as much as my childe, brother, or kinſe-man is deade, I make A.B. my executor: in this caſe if the child or other perſon whom the teſtator ſuppoſed to be deade, bee aliue: hee that is named executor ſhall not be admitted to the executorſhip, but the child, brother or kinſe-man, whom the teſtator thought to haue been dead[s], for that it is preſumed to haue beene the meaning of the teſtator, to haue made that childe, brother or kinſe-man, his executor, if he had thought him to haue beene liuinge, and not the partie named[t].

r) Iul. Clar. §. teſtm. q. 35 n. 2.

s) Sichard. in Rub. de hæred. Inſti. C. n. 3.

t) Sichard. vbi ſupr. p L. fi mr. C. de inof. Teſta. Alex. conſil. 185. lib. 2.

But † if on the contrarie, it doo appeare to be the teſtators meaning, not to make him executor to whom he dooth bequeath his goodes, as when the teſtator hauinge bequeathed his goodes to one perſon, dooth expreſlie name an other to be his executor[v], or if he to whom all is bequeathed, be vnable[x] to execute the teſtament, or if the teſtator bequeath the reſidue of his goodes, the debtes diſcharged[y]: In theſe caſes the vniuerſal legatarie dooth ſtill remaine legatarie, and is to receiue his legacie, at the hands of the executor, or adminiſtrator. 7

v) Bar. in L. his verbis: de hæred. Inſtit. ff. cuius opinio communiter approbatur, ait Graſſ. Theſaur. com. op §. Inſtitutio. q. 14. Berous in c. Ranutius de teſta. extr. n. 20.

x) Inſtit. de hæred. quæ ab inteſtat. in princ.

y) Imol. in d. c. Ranutius n. 8. Berous ibi. 37. quæ opinio communis eſt, teſte Graſſ. d. §. Inſtit. q. 14. n. 6.

If the † wordes be indifferent either to make an executor or an vniuerſall legatarie; a teſta- 8

ment

ment or a codicill [z], and no circumſtances to or fro, to maintaine the one rather then the other, either elſe the circumſtances being indifferent: although in this caſe the iudge ought rather to pronounce the deceaſed to haue made a teſtament, then a codicill, and to haue lefte an executor rather then to haue died inteſtate, in reſpect of the ciuill and eccleſiaſticall lawes [a]: Yet in regarde of the ſtatute, it is more ſafe to cõmit the adminiſtratiõ to the widdow or the next of kin demanding the ſame, for feare of forfeiture of tenne pounds [b], leaſt peraduenture the iudge before whom the penaltie is to be demaunded ſhall deeme the partie to haue died inteſtate.

z) Defunct' quãdo cen' ſendus eſt voluiſſe codicillari, vel teſtari. Pulchrè Bald. in L. filij. C. familiæ Hereiſcund. ſed pleniùs Mantic. de conject. vlt. vol. lib. 2. tit. 3.

a) Legiſtæ. in L. verbis ciuilibus. de vulg. ſub. ff. Canoniſtæ. in c. cùm tibi, de teſta. extr. Mantic. de conject. vlt. vol. lib. 2. tit. 3. n. 12.

b) Stat. H. 8. an. 21. c 5.

9 Furthermore † the teſtator maie lawfullie make his executor not onelie of his owne accorde without interrogation, but alſo at the intreatie or requeſt of an other (except in certaine caſes elſe where declared [c],) and that not onelie by the wordes aforeſaid, but by others of like effect [d]. And therfore if the teſtator beeing demaunded by an other, whether he doe make A. B. his executor, doo anſwere yea, or I doo, or what elſe, or why not, or whom elſe ſhoulde I make executor, or I cannot denie; this is a pure and a ſimple aſſignation of an executor [e].

c) Supr. part. 2. §, xxvj.

d) Mantic. de conject. vlt. vol. lib. 4. tit. 3.

e) Ripa. Alcia. Zaſius & alij Doctores. in L. 1. §. ſi quis ita. de verb. ob. ff. Clar. §. teſtm. q. 57.

10 Prouided † alwaies in all the caſes aforeſaid, and in euerie other like caſe, that the teſtator haue a firme & conſtant purpoſe and meaning to make his will, when hee vttereth anie ſuch words [f], for other wiſe if the teſtator haue no meaning to make his will, although he vſed the moſt plaine wordes that might be deuiſed, for

f) Mantic. de conject. vlt. vol. lib. 4. tit. 4. in prin. ſupr. 1. part. §. iij. verb. ſententia.

for the making of an executor, yet (as I ſaide ere while) it were no more a teſtamente or a will, then a painted lion is a lion[g], for the purpoſe and meaning of the teſtator is the life and ſoule (as I maie tearme it) of the teſtamente, without the which the teſtators wordes are but winde: if that doo not appeare, ſuche onelie words ſhal not be admitted for a will[h], for what if the teſtator ſaie in ieaſte, I make thee my executor? what if he ſaid ſo for fear? what if he were ouercome with drink? therfore it is not inough to prooue the teſtators wordes, vnleſſe it bee prooued that the teſtator had *animum teſtandi*: which how it is proued, is elſe where declared[i].

g) Supr. part. 1. §. 3. n. 25

h) L. diuus L. Lucius. ff. de mil. teſta. § plane. Inſtit. de mil. teſta. Mantic. de coniect. vlt. vol. lib. 2. tit. 4.

i) Infr. 1. part. §. xiij.

Note alſo that as it skilleth not by what wordes the executor is appointed, ſo † it is not material in what part of the teſtament he be appointed, whether in the beginninge or in the middeſt, or ending[k]. 11

k) §. ante Inſtit. de lega. Graſſ. Theſaur. com. op. §. Inſtitutio. q. 1.

The † effect of a pure and ſimple aſſignation of an executor is this, that the executor maie immediatelie after the death of the teſtator vndertake the executorſhippe, and enter vpon the teſtators goodes and cattelles[l]: whereas on the contrarie, the effect of a conditionall aſſignation, dooth ſuſpend his admiſſion and execution of the teſtament, as afterward more fullie dooth appeare[m]. 12

l) Weſemb. in tit. de acquir. hæred. ff. & in tit. de hæred. Inſtit. Et hoc verum eſt, etiam ante probationem teſtaméti Plowd. lib. 1. in caſ. inter Greisbrook & Fox. Cagnol. in L. ſi precib' C. de impub. & alijs. ſub. n. 276. 277. 278.

m) Infr. ead. part. §. 6. 7.

And † there note that if the teſtator ſay, I make A. B. *my executor according to the cõditions afterwards expreſſed*, if the teſtator afterwardes expreſſe no conditions, it is in effecte as if the teſtator had made him his executor ſimplie[n]. And ſo hee 13

n) L. pen. C. de Inſtit. & ſub.

maie

maie enter vpon the teſtators goodes preſentlie after his death, for the teſtator in not expreſſing anie conditions, is preſumed to haue altered and reuoked his purpoſe concerninge the adding of conditions [o], and conſequentlie that he would haue the appointment of the executor to be pure and ſimple: howbeit if the teſtator making his executor vpon conditions, to be then expreſſed afterwardes, in the meane time, whiles he is in making his will, be ſodainlie preuented by death, or inſanitie of minde, that he can not expreſſe thoſe conditions, according to his purpoſe and determination: In this caſe the aſſignation is voide, and he which is ſo appointed executor is not to be admitted to the executorſhip [p]. Likewiſe if the teſtator doo make his executor after this maner: I make A.B. my executor if I ſhall expreſſe anie conditions, in this caſe no conditions beeing expreſſed, he that is ſo appointed ought not to be admitted [q].

o) DD. in d. L Pen.

p) L. ſi quis deſtinauerat. aliàs, ſi is qui. ff. de teſtam. Paul. de Caſtr. in L. iubemus. C. de teſta. & latiùs infr. part. 7. §. 12.

q) Dec. & alij. in d. L. Pen. C. de Inſtit. & ſub

14 It is † alſo to be noted, that, that aſſignation of an executor is in effect pure & ſimple, where the condition is impoſſible or vnhoneſt, for ſuch conditions are reputed as not written but omitted [r], and ſo the executor without accompliſhment of anie ſuch condition, is forth with to be admitted to the executorſhip, excepte in ſome caſes, as hereafter is declared [s].

r) §. Impoſſibilis, Inſtit. de hæred. inſtituend. L. obtinuit. de cond. & demon. L. conditiones. de condic. Inſtit. ff.

15 Furthermore † when it is certaine, that the condition will neceſſarilie followe or bee extant, the appointmente of the executor made vnder ſuch condition, is reputed pure and ſim-

s) Infr. ead. part. §. 6. 7.

ple, as if the teſtator make A.B. his executor if the ſunne ſhall riſe the next daie [t]: vnleſſe the time when the condition will be extant, be vncertaine, as I make A. B. my executor if my ſonne ſhall die, for though it be moſt certaine that he will die: yet nothing is more vncertaine then the time when, and therefore the aſſignation is in effect conditionall [v].

t) L ſi pupillus. §. ſub conditione. ff. de noua. Alex. conſil. 59. n. 14. vol. 4.

v) Sichard. in Rub. de condic. Inſtit. C. & fuſius. infr. ead. part. §. 17. & part. 7. §. 23.

And the like maie be ſaid,† when the condition is referred to that which is paſte or preſent, as if the teſtator ſaie, I make A.B. my executor, if he be bachelar of the ciuill lawe, or if hee haue beene ſtudent in the vniuerſitie of Oxforde, for this kinde of condition is not properlie a condition [x], but rather a finall cauſe, wherefore the teſtator made his executor [y]. And although the teſtator be vncertaine whether the executor be bachelar of lawe, or haue beene ſtudent, yet it is certaine in reſpect of the facte it ſelfe: and is either true or falſe at that inſtant when it is made, and ſo the condition worketh no delaie or ſuſpenſion, but is either a good or void aſſignatiõ at that moment [z]. 16

x) L. ſi ita ſtipulatus. ff. de verb. ob. Bar. in L 1. de cond. & demon. ff.

y) Iaſ. in L. ſtichum. de leg. 1. ff.

z) DD. in d. L. ſi ita ſtipulatus.

Finallie† that aſſignation of an executor is pure and ſimple, when that condition is expreſſed which is neceſſarilie vnderſtoode [a], as if the teſtator ſaide, I make A.B. my executor if the lawe will [b], or if he will vndertake the executorſhip [c]. 17

a) L. hæc verba de leg. 1. ff. L. conditiones. de cond. & demon. ff.

b) Mantic. de coniect. vlt. vol.

c) Graſſ. Theſaur. com. op. §. legatum. q. 47.

That† which hath beene ſpoken of the making of an executor (accordinge to my former aduertiſementes) maie eaſilie bee applied to a legacie, *mutatis mutandis*: wherefore as that nominati- 18

mination or aſſignation of an executor is pure and ſimple which is made without condition, ſo that legacie is pure and ſure which is giuen without condition.

Secondlie, by the like application it maie appeare, that it is not materiall in what forme of wordes a legacie be bequeathed, ſo that the teſtators meaning doo appeare: which meaning is to be preferred before the proprietie of wordes [d], and that not onelie concerninge goodes and cattelles, but alſo concerning lands and tenementes, for further declaration whereof I haue added theſe examples following, which I haue borrowed out of a little booke called the tearmes of lawe [e].

d) §. noſtra. Inſtit. de lega.

e) Verb. deuiſe.

19 Firſt † therfore if a man doo by his will deuiſe „
to A.B. all his landes and tenementes: In this „
caſe not onelie all his landes and tenementes, „
which the teſtator hath in poſſeſſion doo paſſe, „
but thoſe alſo which hee hath in reuerſion by „
vertue of this word tenements. „

Item if landes be deuiſed to a man to haue „
to him for euermore, or to haue to him, and his „
aſſignes: in theſe two caſes the deuiſe ſhall haue „
a fee-ſimple, wheras if it be giuen by feoffemēt „
in ſuch tearmes, the feoffee hath but an eſtate „
for his life, for a deuiſe made without expreſſe „
wordes of heires is good euen in fee-ſimple. „

Item if a man deuiſe his lande to an other to „
giue or ſell, or doo therewith at his pleaſure, & „
will this in fee-ſimple. „

Item a deuiſe made to one and to his heires „
males, dooth make an eſtate in taile, but if ſuche „

„ wordes be put in deede of feoffement it ſhall
„ be taken in fee-ſimple, becauſe it dooth not ap-
„ peare of what bodie the heires males ſhall bee
„ begotten.

„ Item if landes be giuen by deede to A.B. and
„ to the heires males of his bodie, who hath iſſue
„ a daughter, which daughter hath iſſue a ſonne,
„ and dieth, there the lande ſhall returne to the
„ donor, and the ſonne of the daughter ſhall not
„ haue it: becauſe he cannot conueighe himſelfe
„ by heires males, for his mother is a let thereun-
„ to. But otherwiſe it is of ſuche a deuiſe giuen
„ by will, for there the ſonne of the daughter ſhal
„ haue it, rather then the will ſhall be voide.

„ Item if one deuiſe to an infante in his mo-
„ thers wombe it is a good deuiſe, though ſuch a
„ feoffement, graunt or gift be voide.

„ Item if one will that his ſonne ſhall haue his
„ lande after the death of his wife, heere the wife
„ of the deuiſour ſhall haue the lande firſte, for
„ tearme of her life. So likewiſe if a man deuiſe
„ his goodes to his wife, and that after the de-
„ ceaſe of his wife, his ſonne and heire ſhall haue
„ the houſe where the goodes are, there the ſon
„ ſhall not haue the houſe during the life of the
„ wife: for it is preſumed that his intente was,
„ that his wife ſhoulde haue the houſe alſo for
„ tearme of hir life, notwithſtanding it were not
„ deuiſed vnto her by expreſſe wordes.

„ Item if a deuiſe of land be made to A.B. and
„ to his heires males of his bodie begotten. After
„ the deuiſe hath iſſue a ſonne and a daughter,
„ and dieth, heere the daughter ſhall haue the
land,

lande, and not the ſonne; howſoeuer he bee the more worthie perſon, and heire to his father, but becauſe the will of the deade perſon is that the daughter ſhall haue it: therefore lawe and equitie would that it ſhould ſo be.

Thirdlie it maie appeare by that which hath beene ſaide of an executor, that the legacie is voide where the teſtator hath not *animum teſtandi*[f].

Fourthlie that there bee diuers conditions, which doe not make the legacie conditionall[g].

20 Laſtlie † concerning the effect of the one & the other, albeit otherwiſe the appointinge of an executor, and the bequeathing of a legacie doo agree in diuers thinges: yet in this they do differ greatlie. That is to ſaie, an executor ſimplie inſtituted, maie as ſoone as the teſtator is deade, enter to the goodes and cattelles of the
21 deceaſed[h]: But † a legatarie or deuiſee maie not of his owne authoritie take the legacie, & ſeruе himſelfe, but muſte receiue the ſame at the handes of the executor[i]: the reaſon isfor that the executor is charged with the paiment of all the teſtators debtes, ſo farre as the goodes and cattelles will extend, and the legacies are not to be paide but of the reſidue, if a-
22 nie thing remaine[k]. And † the legatarie hath no remedie by the common lawes of this lande, for anie legacie of goodes to him bequeathed, if the executor will not deliuer the ſame: But it behooueth the legatarie in this caſe to take a citation againſt the executor of the teſtamente,

f) Inſr. part. 7. § 13.

g) Inſr. §. 5. 6.

h) L. cùm hęrædes. ff. de acquirend. poſſ. Bar. in L. ex facto. ff. de hæred. inſtituend. Cagnol. in L. precibus. C. de imp. & alio. ſubſt. n. 276.

i) L. 1. quorum lega. ff. L. non dubium. C. de lega. Perkins. tit. teſtament. c. 7. fol. 94. Brook. tit. deuiſe. n. 3.

k) Perkins vbi ſupr. & in tit. deuiſes. (vbi etiã tradit aliam cautelam, ſed parum honeſtam fruſtrandi legata & fraudandi teſtatorem.) Aliam rationem aſſignat ius ciuile; nempe, ob detractionem falcidiæ, quæ ratio quàm ſit apud nos debilis, facile eſt conijcere, quandoquidem nullus eſt falcidiæ locus infra regni noſtri limites.

to appeare before the ordinarie or other eccle-
siasticall iudge competent to answere him in a
cause of legacie[l]. Notwithstandinge † in some 23
cases the legatarie may be lawfullie possessed of
his owne legacie, without deliuerie thereof to
be made by the executor, for if there be sufficient goodes and cattelles in the handes of the executor, to paie all the testators debtes and legacies, & the legatarie is possessed of the thinge bequethed, at the time of the death of the testator: in this case the legatarie doubtlesse by the ciuill lawe maie still retaine the same in his own handes[m]: Neither is he to deliuer the same to the executor, and afterwardes to receiue the same againe at his hands[n]. Likewise if the testator giue licence to the legatarie, to enter to his legacie: In this case the legatarie maie without the priuitie or consent of the executor take his legacie and keepe the same, so that there be sufficient besides to discharge the testators debts[o]. Peraduenture also in case of such sufficiencie of goods, a certain special thing being bequeathed (as the testators riding horse, his bookes, or his signet) though an other person then the executor detain the same, the legatarie maie as wel by the laws of this realme[p], as by the ciuill lawe[q], commence sute against the occupier therof and recouer the same legacie[r], vnlesse this third perso were able to iustify his possessiō, euen against the executor or against the testator himselfe if he were liuing: for that is a lawfull barre or exception against the legatarie also[s]. But if there bee not sufficient goodes to paie the testators debtes,

l) Tract. de repub. Angl. lib. 3. c. 9. Fitzh. Na. Br. breui de consultatione Brook. tit. deuise. n. 3. 27. 41. Plowd. in cas. inter Paramor & Yard. Termes of law. verb. deuise.

m) Socin. consil. 11. vol. 1. Ripa in L. 1. ff. quorū lega. n. 15. Olden. de action. clas. 2. act. 2. fol. 113.

n) c. dolo. de reg. iur. 6.

o) Ias. in L. non dubiū. C. de lega.

p) Brook Abridg. tit. deuise. n. 4. 30.

q) Sichard. in L. 3. C. de lega. n. 16

r) Ratio est quia dominium rei legatæ statim post mortem testatoris transit in legatarium, etiam nondum facta traditione. gloss. & DD. in §. in nostra Instit. de lega. & in L. à Titio. ff de fur.

s) L. si rem legatam. ff de excep & præiudic.

debtes, or if the legacie conſiſte in quantitie or be generall, (as if the teſtator bequeath twentie poundes ora horſe) the legatarie can not of his owne authoritie take ſo much of the teſtators monie, nor anie horſe which was the teſtators without licence giuen by the teſtator or permiſſion of the executor[t], nor maie bring anie action againſt anie thirde perſon for the ſame legacie, albeit he poſſeſſe all the teſtators goodes[v]. Finallie if the legatarie bee alſo executor, then maie he if he will as legatarie accept the ſame[x]. But what if it doo not appeare whether he did accept the ſame as legatary or as executor, whether is it preſumed that hee did accept the ſame as executor or as legatarie, this queſtion is elſe where abſolued.

t) Brook. tit. deuiſe. n. 6. & n. 30.

v) Quod autem dixim⁹ iure ciuili triplicem concedi actionem legatario, p conſequēdo legato, procedit ſpecie relictâ, ſed ſi quantitas, vel genus relinquatur, non competit rei vendicatio. Bar. in L. 1. ff. de leg. 1. Sichard. in I. nō dubium. C. de lega. niſi fortè quantitas, nō vt quantitas, ſed vt corpus relinquatur, vel niſi genere relicto, facta ſit electio debita, tunc enim idem iuris eſt, ipſóque iure tranſit rei dominium, ac ſi legata fuiſſ ſpecies. Angel. Arc. & alij. in d. §. mſa. Inſtit. de lega. vide ſupra part. 1. §. 6. in fin. & quæ ibidem adnotantur. (x) Sichard. in L. non dubium. C. de lega. n. 13.

Of a conditionall aſſignation of an executor.

1 *The cheeſe pointes conſiderable about the conditionall aſsignation of an executor.*
2 *When the aſsignation of the executor is conditionall.*
3 *By what wordes the diſpoſition is made conditionall.*
4 *Of conditions ſome be neceſſarie, ſome impoſsible, ſome indifferent or poſsible.*
5 *What conditions be neceſſarie.*
6 *Two ſortes of neceſſaric conditions.*
7 *Of impoſsible conditions there be diuers kindes.*
8 *Impoſsible by nature.*

9 *Impoſsible by lawe.*
10 *Impoſsible in reſpect of ſome perſons.*
11 *Impoſsible by reaſon of contrarietie or perplexitie.*
12 *Poſsible conditions are thoſe which are indifferent betwixt neceſſarie and impoſsible.*
13 *Of poſsible conditions, ſome be arbitrarie, ſome caſuall, ſome mixt.*
14 *Item of poſsible conditions, ſome conſiſte in chancing, ſome in doeing, ſome in giuing.*
15 *Of conditions ſome are affirmatiue, and ſome negatiue.*

§.v.

COncerninge a † conditionall aſſignation or nomination of an executor, I thought good to deliuer firſt, *what it is* [a], ſecondlie what *manner of wordes doo make the diſpoſition to be conditionall* [b], thirdlie *how manie kindes of conditions there be* [c], fourthlie *what is the effect of a condicionall aſsignation of an executor* [d], fiftlie I haue examined *certaine queſtions*, not impertinent hereunto [e]. 1

The aſsignation † of an executor is conditionall, when the teſtator dooth not make his executor ſimplie, but dooth adde ſome qualitie to the aſsignation, wherby the effect of the diſpoſition is ſuſpended or hindred, and dependeth vpon ſome future euent [f], as for example, the teſtator maketh A.B. his executor, if his ſhip ſhall returne from *Venice*. 2

a) Eod. § n. 2.

b) Infr. n. 3.

c) Infr. n. 4.

d) Infr. ead. part. §. 6.

e) Infr. ead. part. §. 7. §. 8. § 9. cum ſequé. vſq; ad §. 16.

f) Sichard. in Rub. de Inſtit. & ſub. C. n. 1. Graſſ. Theſaur. com. op. § legatum. q. 46.

Diuers

3 Diuers † words there be wherby the diſpoſitiō of the teſtator is made cōditionall. Firſt & principallie by this word (*If*)[g], as in the former exāple, by this worde alſo (*when*) the diſpoſition is ſometimes made conditionall, namelie when it is ioined to a verbe of the future tenſe: as I make A.B. my executor, or giue him a hundred poūd when he ſhall bee of the age of twentie one yeeres[h], or when he ſhall bee married[i]. Sometimes by this worde (*whiles*:) as I make my wife executrix, or giue her a hundred pound, whiles ſhe ſhall abide with my children: for it is in effect as though the teſtator had ſaid, if ſhe abide[k]. Alſo theſe wordes (*when ſo euer, where ſo euer*) the diſpoſition is made conditionall[l]: ſometimes alſo by theſe wordes (*which, what perſon, whoſoeuer*:) as I make him my executor, or giue him a hūdred poūd which ſhal marie my daughter[m]: ſometimes the *ablatiue caſe abſolute*, dooth infer a condition, as (my ſonne being deade) I make A.B. my executor[n], in which caſe not onelie A. B. is aſſigned conditionallie, that is to ſaie, if the teſtators ſonne be deade, but alſo the teſtators ſonne if he be liuing, is preſumed to bee aſſigned, during his life[o]. Diuers other words there bee whereby the diſpoſition is made conditionall, wherein *Bartolus*[p] hath not onelie taken great paines, but hath alſo beene at ſome coſte (as it ſhould ſeeme) in making a great feaſte, marſhalling togeather all ſuch nowns, pronownes, verbs, &c, which make the diſpoſition conditional, to whom I referre the reader to be ſatisfied.

g) Bar. in L. 1. de cond. & demon. ff. Mantic. de coniect. vlt. vol. lib. 10. tit. 5.

h) Sichard in Rub. de Inſtit. & ſub. C. n. 4.

i) Bar. in d. L. 1. de cōd. & demon. ff. n. 8, 9. & Paul. de Caſtr. in eand. L. Vaſq. de ſucceſ. progreſ. lib. 3. §. 29. n. 3. in fin.

k) Sichard. in d. Rub. Bar. in L. ſi Titio. ff. quādo dies lega. cedit.

l) L. ſi ita ſcriptum. §. fin. de leg. 2. ff. Sichard vbi ſupra.

m) Sichard. in d. Rub. n. 4.

n) Ripa. in L. centurio. ff. de vulg. & pupil. ſub n. 160. 161.

o) Ripa. vbi ſupr. Alex. conſil. 185. lib. 2.

p) Bar. in L. 1. de cond. & demon. ff.

Manifolde † are the diuiſions of conditi- 4
ons[q], but the plaineſt and fitteſt for this treatiſe, I ſuppoſe to be this, viz. Of conditions ſome be *neceſſarie*, ſome *impoſsible*, ſome *poſsible*[r] or *indifferent*.

Of neceſſarie † conditions ſome maie bee ſo 5
tearmed in reſpect of *facte*, ſome in reſpecte of *law*[s]. By neceſſarie conditions in reſpecte of facte I vnderſtande thoſe conditions, whereof there is a certaine and infallible naturall cauſe, by force whereof the condition muſt neceſſarilie followe: as if the teſtator make A.B. his executor, or giue him a hundred pound if the ſun ſhall riſe the next daie[t]. Of † this kinde of neceſ- 6
ſarie conditions there be two ſortes[v], ſome are certaine in euerie naturall reſpecte, that is to ſaie, it is not onelie certaine that the condition will follow, but alſo when, as in the former example of the riſinge of the ſunne: and ſome againe are certaine but not in euerie reſpecte: As when the teſtator maketh A.B. his executor if his ſonne ſhal die, or when his ſonne ſhal die; for albeit, it bee certaine that euerie man muſt die, yet when, where, or how, it is vncertaine[x]. By neceſſarie conditions ſo tearmed in reſpect *of law*, I vnderſtande all ſuch conditions, which the lawe requireth in euerie acte, albeit the ſame were not expreſſed, as for example, the teſtator ſaith, I make A.B. my executor, if hee will intermeddle therewith[y], or I giue A.B. a hundred pound, if he will[z]. This kinde of ne-

q) Vide Sichard. in Rub. de Inſtit. & ſub. C. à quo multifariam diuiditur conditio, 1. in tacitam & expreſſum, quarum deinde vtraq; ſpecies in tres ſpecies ſubdiuiditur. Tacita nimirum (ait) ex diſpoſitione vel naturæ, vel iuris, vel teſtatoris ſuboritur: expreſſa autem aut eſt neceſſaria, aut impoſſibilis, aut indifferens, ſeu poſſibilis. Et harum rurſus quælibet ſpecies multiplex, quas ego ſpecies in hoc §. explicaui.

r) Sichard. in d. Rub.

s) Bar. in L. 1. de cond. & demon. ff. Mantic. de coniect. vlt. vol. lib. 10. tit. 5.

t) Paul. de Caſtr. in L. ſi pupillus. §. ſub cond. ff. de Nouac. Alex. cõſil. 59. n. 14. vol. 4. Sichard. vbi ſupra.

v) Tu ſi placeat (Iuſtinianiſta) videas Bald. in d. L. ſi pupillos. §. qui ſub cond. vbi poſt gloſſ. ponit tria exẽpla neceſſarię conditionis; vnum neceſſitatis futuræ ſecundum naturam, veluti ſi moriar: aliud neceſſitatis futuræ ſecundum fidem catholicam, vt ſi Antichriſtus natus fuerit: tertiũ neceſſitatis præſentis, veluti ſi non tetigero cælum digito.

x) Sichard. in d. Rub. de Inſtit. & ſub. C.

z) L. hæc verba. de leg. 1. ff.

(y) Graſſ. Theſaur. com. op. §. legatum. q. 47.

ceſ-

ceſſarie condition is ſometimes expreſſed by the teſtator and ſometimes not expreſſed [a].

7 Of † impoſſible conditions there bee foure
8 ſortes [b]; in the firſt ſorte † are contained thoſe whereunto *nature is an impediment*: for example, the teſtator maketh A.B. his executor, or giueth him a hundred pounde if hee touche the skies with his finger: or if hee drinke vp all the
9 water in the ſea [c]. In † the ſecond ſorte are contained thoſe conditions which bee *contrarie to lawe or good manners*, as for example, the teſtator maketh A.B. his executor, or giueth him a hundred pound if he murther ſuch a man, or deflower ſuch a woman [d]: this condition is vnlawfull and vnhoneſt, and conſequentlie to be deemed impoſſible: For the lawe would haue vs to thinke euerie thing impoſſible to be don, which is vnlawfull to be done [e]: heere vppon it is ſaide, *id poſſumus quod de iure poſſumus*, as if euerie thing vnlawfull were alſo impoſſible [f].
10 In † the thirde ſorte are contained theſe conditiõs, which albeit they are not otherwiſe vtterly impoſſible in reſpect of *nature* or of *law*, yet in reſpect of the *perſon* are *ſo harde, that they ſeeme impoſſible*: as if the teſtator make A.B. his executor if hee ſhall marie the kinges daughter, he
11 being but a baſe ſubiecte [g]. In † the fourth ſorte are contained thoſe conditions which by reaſon of *contrarietie* or *repugnant perplexitie* be impoſſible, or incompatible [h], as if the teſtator ſay if my ſonne be executor, I make my daughter my onelie executrix, & if my daughter be executrix I wil that my ſonne be ſole executor [i].

a) DD. in d. L. cha verba.

b) Sichard in d. Rub. de Inſtit. & ſub. C. cui adde Zaſium in L. impoſſibilis. de verb. ob. ff.

c) §. impoſſibilis. Inſtit. de hær. inſtituend. & Minſing. ibid. L. impoſſibilis. ff. de verb. ob. & Bar. ac alij ibid.

d) Minſing. in d. §. impoſſibilis. & DD in d. L. impoſſibilis.

e) L. ſi filius. ff. de cond. Inſtituc.

f) DD. in d. L. ſi filius.

g) Sichard. in d. Rub. de Inſtit. & ſub. C. Minſin. in d. §. impoſſibilis. Zaſ. in d. L. impoſſibilis. ff. de verb. ob.

h) L. ſi Titius. ff. de con. Inſtit.

i) d. L. ſi Titius. Minſin. in d. §. impoſſibilis.

Poſ-

Possible † conditions are those which are as it were in the middest betwixte *necessarie* and impossible conditions, and which are indifferent either to be, or not to be[k]. Of † possible cõditions some are tearmed *casuall*, some *arbitrary*, and some are said to be *mixt* conditions[l]. Casuall cõditions are those wherof the euent is vncertain, in respect of humane knowledge[m]: as for example the testator doth make A.B. his executor, or giue him a hundred pound, if the *king* of Spaine die this yeere[n]. *Arbitrarie conditions* are those which the lawe esteemeth to bee in his power, on whom the condition is imposed[o]: as for example, the testator maketh A.B. his executor, or giueth him a hundred pound, if he shall goe to the church[p]. *Mixt conditions* are those which are partlie abitrarie and partlie casuall[q], or partlie in his power on whom the condition is imposed, and partly in the power of some other: as for example, the testator maketh A.B. his executor or giueth him a hundred pound, if he marie the testators daughter. Furthermore † of possible conditions some consiste in *chauncing*, some in *giuing*, and some in *dooing*[r]. Finallie † of conditions some be *affirmatiue*, some *negatiue*[s], the vse of all which distinctions dooth hereafter ensue[t]. 12 13 14 15

k) Sichard. in Rub. de Inst. & sub. C. n. 9.

l) L. vnic. §. sin autem. C. de cad. tol. Bar. in l. 1. de Instit. & sub. C. Mantic. de coniect. vlt. vol. lib. 10. tit. 5. n. 3. Wesenb. in tit. de cond. Instit ff.

m) Spiegel. Lexic. verb. fortuitum.

n) Minsing. in §. pen. Instit. de hæred. instit.

o) Sichard. in d. Rub. Vigl. & Minsing. in §. pen. de hæred. instit.

p) Iaso. in L. si filius à patre. ff. de lib. & posthu. n. 1.

q) Bar. in L. 1. de Instit. & sub. C.

r) L. in facto ff. de cond. & demon.

s) d. L. in facto.

t) Infr. cad. part. §. prox cum sequen. vsque ad §. 16.

Of the effect of a conditionall disposition.

1 *Diuers and contrarie effects of conditions.*

2 *Two*

2 *Two rules whereof the former is, that necessarie and impossible conditions doo not suspend the effecte of the disposition.*

3 *Examples of this former rule.*

4 *The second rule is, that possible conditions doe suspend the effect of the disposition.*

5 *Example of the same rule.*

6 *Conditions partelie certaine, and partlie vncertain, doo suspend the effect of the disposition.*

7 *Necessarie conditions beeinge otherwise expressed then vnderstood, suspend the effect of the disposition.*

8 *Impossible conditions which the testator supposed to be possible, doo suspend the effect of the disposition.*

9 *Diuers restraintes of this laste position beeinge the fourth limitation of the former rule.*

10 *Verie hard conditions or almost impossible, doo suspend the effect of the disposition.*

11 *A restraint of this last position beeing the fifte limitation.*

12 *Impossible conditions negatiuelie conceiued, are not voide themselues, but make voide the disposition.*

13 *A restraint of this last conclusion being the sixt limitation.*

14 *Conditions which become impossible being at the first possible, doo hinder the effecte of the disposition.*

15 *A restraint of this conclusion being the seuenth limitation of the former rule.*

16 *The condition which is both impossible and vnhoneſt maketh void the disposition.*

17 Con-

17 *Conditiõs which be impoſsible by reaſon of repugnancie, make voide the diſpoſition.*

18 *A reſtraint of this laſt limitation.*

19 *Poſsible conditions doo ſuſpend the effect of the diſpoſition vntill they be accompliſhed.*

20 *Diuers limitations of this poſition being the ſecõd rule.*

21 *A further conſideration of the former concluſions together with other queſtions.*

§. vj.

THe † manifolde diuerſitie of conditi- 1
ons breedeth many ſundrie and contrarie effectes. For ſometimes hee that is appointed executor conditionallie, or to whom anie legacie is giuen conditionallie, is not to be admitted to the executorſhippe, nor can effectuallie demaund the legacie, vntill the condition bee accompliſhed. And againe, ſometimes hee that is named executor, or to whom anie thinge is bequeathed vpon condition, maie preſentlie be admitted to the executorſhippe, or demaunde the legacie, though the condition be not yet accompliſhed, or as though no condition at all were expreſſed.

Wherefore that we maie knowe, when the condition is to bee firſte accompliſhed, before the executor can be admitted, or the legatarie demaund his legacie; and contrarie wiſe when the executor maie be admitted, or the legatarie make his demaund before the accompliſhment

of

of the conditiō; I thought good to deliuer two rules with their limitations.

2 The † former rule is this, that when the condition is *extreame, that is to ſaie, either neceſſarie or impoſsible, ſuch condition hindereth not the executor nor legatarie, but that he maie be admitted to the executorſhip or recouer the legacie, as if ſuch had not*
3 *beene at all expreſſed* [a]: for example, † the teſtator doothmake thee his executor, or dooth giue thee a hundred pounde if the ſunne ſhall ariſe vpon Eaſter daie [b]: Or if the teſtator dooth make thee his executor, or giueth thee a hundred pound if thou ſhalt drinke vp all the water in the ſea [c]; bothe theſe conditions are extreame, the one neceſſary, the other impoſſible: and therefore in theſe two caſes thou maieſt be admitted executor, or obtaine the legacie, as if the diſpoſition had beene ſimple or without anie ſuch condition [d].

4 The † ſecond rule is this, that *when the condition is not extreame, but indifferent or poſsible, then the ſame condition muſt firſt be ſatisfied before the executor can be admitted, or the legatarie recouer his le-*
5 *gacie* [e]. For † example, the teſtator dooth make thee his executor, or dooth giue thee a hundred pound if his ſhip ſhal returne from *Venice*; this condition is indifferent, neither neceſſarie nor impoſſible. In the meane time therefore vntill the ſame condition be extant, thou canſt neither be executor nor obtaine the legacie by force of that diſpoſition [f]. To returne to the former rule the ſame is diuerſlie limitted or reſtrained.

a) L. ſi pupillus. §. qui ſub conditione de Noua. L. nā etſi. L. quod ſi ea. de cond. indeb. L. Iulianus de iure. de lib L. hæres meus. de cond. & demō. L. 1. L. conditiones. L. filius. L. q̄dam. L. mulier. de condic. Inſtituc. ff. L. repræhēdenda. de Inſtit. & ſub. C. §. impoſſibilis. Inſt. de hæred. inſt.

b) Paul. de Caſtr. in d. L. ſi pupillus. §. qui ſub condic. Sichar. in Rub. de Inſtit. & ſub. C. n. 7.

c) Minſing in §. impoſſibilis. Inſtit. de hæred. inſtit.

d) Per LL. ſupradictas.

e) L. qui hæredi. de cōd. & demon. L. ſi quis ſub conditione. ſi quis omiſ. cā. Teſta. L. cedere diem. de verb. ſig. ff. Graſs: com. op. §. legatum. q. 52. Simo de Prætis. de interp. vlt. vol lib. 5. interp. 2. dub. 2. fol. 66. n. 109.

f) Minſing. in §. hæres. Inſtit. de hæred. inſtit.

g) d L. qui hæred. & ibi gloſſ. Bar. & alij.

The

The firſt limitation thereof may be this, that albeit † that condition which by courſe of na- 6
ture muſt needes followe, is accompted as it were alreadie accompliſhed by reaſon of the infallible certaintie, yet when the condition is not in euery reſpect certain, but certaine & vncertain in diuers reſpects: as for example, the teſtator maketh A.B. his executor, or giueth him a hundreth pounde if or when his ſonne ſhall die [h]: howſoeuer this condition be certaine in reſpect of death, becauſe it is not certaine in reſpect of the time of his death, therefore in the meane time the executor or legatarie, where there is ſuche a condition can not obtaine the executorſhippe or legacie, but muſt expect the euent of the condition [i].

An other † limitation to the former rule is 7
this, although the diſpoſition bee not made conditionall by expreſſing of that condition, which by the lawe is neceſſarilie vnderſtood [k]: Neuertheleſſe, if the condition be expreſſed in other manner then is vnderſtood, the diſpoſition is thereby made conditionall [l]; ſo that in the meane time, the effect thereof is ſuſpended, as for example, the teſtator ſaith, I giue to A.B. twentie pound if he wil [m]. In which caſe except the legatarie doo by ſome meanes declare his willingneſſe, the legacie is not due, and if hee die in the meane time, before hee haue declared his willingneſſe, the legacie is not tranſferred to the executor or adminiſtrator of the legatarie [n], whereas if no ſuch condition had beene expreſſed, but that the legacie had beene left

h) nihil intereſſe vtrũ teſtator dixerit ſi morietur, vel cùm morietur prius. per Bar. Caſtrenſ. & Alex in L. extraneum. cl. 1. C. de hæred. inſtit. quorum opinio communis eſt, ait Alex. in d. L. extraneũ. licet ſecus ſit in contractibus.

i) Paul. de Caſtr. & Iaſ. in d. L. extraneum. Sichard. in d. Rub. de Inſtit. & ſub. C.

k) L. hæc verba. ff. de leg. 1.

l) L. ſi ita. §. illi. ff. de leg. 1.

m) d. §. illi. ibi, ſi volet, id eſt, ſi ſe velle declarauerit.

n) Iaſ. & alij in d. §. illi. Quære tamen, iſto ſiquidem caſu diſtinguit Practic. Papienſ. in forma libelli, pro legat. rei ſingular. fol. 455.

left ſimplie, then albeit the legatarie had died not knowinge of the ſaide bequeſt, his executors or adminiſtrators might haue obtained the ſame[o].

o)Bar.Zaſ.& alij in d. L.hęc verba.ff.de leg.1.

The third limitation is, when it dooth appeare to be the teſtators meaninge, by the expreſſing of the ſaid neceſſarie cõdition to make the diſpoſition conditionall[p].

p)Graſſ.Theſaur.com. op.§.legatum.q.47. vbi etiam oſtenditur quomodo appareat huiuſmodi teſtatoris voluntas.

8 The fourthe is, that † although impoſſible conditions,whether they be impoſſible by nature or by lawe , doo not hinder the effecte of the diſpoſition, beeing reputed as if they were not written nor vttered[q]: Neuertheleſſe if the teſtator did ſuppoſe the ſame condition to bee poſſible or lawfull, then is not the condition voide but the diſpoſition whereunto it is added[r]. As for the example, the teſtator maketh A.B.his executor , or giueth him a hundred pound if he marrie his ,the teſtators daughter, ſuppoſing her to be liuing whereas ſhe is dead: in this caſe the condion is impoſſible, for the legatarie can not marrie a dead woman: And yet neuertheleſſe,becauſe the teſtator did think her to be liuing,and ſo the condition to be poſſible.A.B.cannot be executor,nor obtaine the legacie, for it is not likelie, that the teſtator would haue made him executor,or haue giuen him a hundred pound,if he had knowen or beleeued his daughter to haue beene dead[s].How-

q)L.3.ff.de cond. & demon.§.impoſſibilis. Inſtit.de hæred.inſtit. Graſſ.Theſaur.com. op.§.legatum.q.50.

r)L.ſeruo manumiſſ.ff. de cond.indebit.

s)DD.in d L.ſeruo manumiſſo.

9 beit † there be diuers caſes, wherein the diſpoſition is not voide by reaſon of an impoſſible condition,which the teſtator did accompt poſſible and lawfull, but the condition it ſelfe is

voide howſoeuer it ſeemed poſſible in the opinion of the teſtator: one is where the condition maie bee accompliſhed by ſome equiualent meanes though not in the ſame manner deſcribed in the diſpoſition[t]. An other caſe is, when the teſtator after the making of his will vnderſtanding the condition to be impoſſible, did neuertheleſſe confirme his will by codicils[v]. The like is, when the teſtator was doubtfull whether the condition were poſſible or no[x], or the bequeſt were in fauour of libertie[y], or *in fauorem piæ cauſæ*, when the teſtator doth bequeath any thing to be imployed to godly vſes, for then the condicion which he ſuppoſed poſſible is reiected, and the diſpoſition auaileable as pure and ſimple[z].

The fifth, is when the † condicion is not vt- 01
terly impoſſible, but very harde and as it were impoſſible to bee performed by him on whom it is impoſed. In which caſe it ſeemeth to bee the purpoſe of the teſtator, that the partie ſhall reape no benefit by that diſpoſition: Otherwiſe the teſtator would not haue impoſed ſo harde and difficult a condition[a], and therefore in this caſe the condition doth ſuſpend the effect of the diſpoſition, vntill the condition perhaps bee accompliſhed[b]. Notwithſtanding † if the 11
condition be impoſſible onely in the reſpect of the ſhortnes of the time preſcribed by the teſtator: as if he make A. B. his executor, or giue him an hundred pound, if he doo erect a monument within three daies after his death: in this caſe the condition hurteth not[c], for that it reſpecteth

t) L. huiuſmodi §. ſi ita cui. ff. de leg. 1. Bar. in L. 1. de con. & demon. ff. Iaſ. in d. L. ſi ita. §. illi. de leg. 1.

v) Iaſ. in d. L. ſeruo manumiſſ. Are. in L impoſſib. de verb. ob. ff.

x) Bar in L. ab omnibus. §. in teſtō. de leg. 1. Are. in L. impoſſibilis de verb. ob. Iaſ. in d. L. ſeruo manumiſſ. de cond. indeb. ff.

y) L. ciuitatem. §. falſum iuncta gloſſ. de cond. & demon. L. cùm Stichus. de ſtatu lib. ff. & Iaſ. in d. L. ſeruo.

z) Bald. in L. 1. C. de com. ſeruo. manumiſſ. Bar. in L proxime. §. 1. de his quæ in teſta. del. ff. & clarius per Iaſ. in d. L. ſeruo manumiſſ.

a) Sichard. in Rub. de Inſtit. & ſub. C. Minſin. in §. impoſſibilis. Inſtit. de hæred. inſtituend.

b) L. cùm hæres. §. 1. de ſtatu lib. L. continuus. §. illud. de verb. ob. ff.

c) L. ſi mihi & tibi. § 1. ff. de leg. 1.

reſpecteth the execution and not the ſubſtance of the will. And it is to be vnderſtood that the teſtator would haue it performed with as great expedition as is poſſible[d].

d) Iaſ. Lanc. Dec. & alij in d. §. 1. Zaſ. in L. continuus. §. illud. de verb. ob. ff.

12 The ſixt is when † the impoſſible condition is conceiued negatiuely, for then it is not accompted as if it were voide it ſelfe, (as is the affirmatiue poſſible conditiõ) but it maketh void the diſpoſition whereunto it is adioyned: as for example, the teſtator chargeth his executor to whome he hath alſo giuen the reſidue of his goods, that if hee doo not touch the skies with his finger, or doo not kill his father, then to pay to A.B. an hundred pound; in this caſe the legacie is voide[e]: The reaſon is, becauſe the executor who otherwiſe ſhoulde haue the ſame thing bequeathed, is not to be puniſhed for not doing that thing which is impoſſible or vnho-

e) §. 1, vltim. Inſtit. de lega. in fin. L. ab eo. C. de fideicom. L. vnic. C. de his quæ Pæn. nomine.

13 neſt to be done[f]. But † if the negatiue impoſſible condition bee not ſet downe in way of penaltie but ſimply, the diſpoſition is not voyde but taketh effect preſently: as for example, the teſtator maketh A. B. his executor or giueth him an hundred pound, if hee doo not drinke vp all the water in the ſea: In this caſe (if any were ſo fonde as to adde any ſuch condition) the effect of the diſpoſition is not hindred, and ſo A.B. is to be admitted executor, or may obteine the legacie, as if no condition were expreſſed[g].

f) Minſing. in d. §. vlt. Inſtit. lega. Caſtrenſ. in d. L. vnic. C. de his. Pœn

14 The ſeuenth limitation is, when † the condition was not impoſſible at the firſt, but becõmeth impoſſible afterwardes, for then it is not

g) L. impoſſibilis. de verb. ob. ff. Bar. & alij in eand. L. Paul. de Caſtro. in d. L. vnic. quem videas.

void, but maketh the diſpoſition void: for example, the teſtator maketh A.B. his executor, or giueth him a hundred pound if he marie his, the teſtators daughter: afterwardes and before mariage this woman dieth, whereby the condition is made impoſſible: In this caſe the condition although nowe impoſſible is not void, but maketh void the diſpoſition; and ſo A.B. cannot be executor, nor obtaine the legacie by vertue of ſuch diſpoſition [h]. But † if the 15
woman were not dead, but did refuſe to be maried, and ſo the condition become as it were impoſſible, for lacke of her conſent; In this caſe the diſpoſition were not void, & ſo he might be admitted to the executorſhip or obtaine the legacie, as if no condition had beene impoſed, or rather as if the ſame had beene accompliſhed: as elſe where [i], is more fullie declared.

The eight is when † the condition is both 16
impoſſible and vnhoneſt, for then the diſpoſition is thereby void: and that in disfauour of the the teſtator, who added ſuche a condition [k], whereas if the condition had beene onelie impoſſible or vnlawfull, the diſpoſition had beene good, and that in fauour of the teſtament [l].

The ninth is when the condition is impoſſible by reaſon of perplexitie, whereof there is example before, for then the diſpoſition is void [m].

The tenthe is, when † the condition is re- 17
pugnant to the nature of the diſpoſition, as in captious diſpoſitiõs, whereof I haue ſpokẽ hereafter more at large [n]. Notwithſtanding † if the 18
repug-

h) Mantic. de conject. vlt. vol. lib. 11. tit. 16. n. 23.

i) Infr. ead. part. §. 8.

k) Bald. in L. ſi pater. de inſtit. & ſub. C. n. 5.

l) Gloſſ. in §. impoſſibilis. Inſt. de hæred. inſtit. aliud autem in contractibus obtinet.

m) L. vbi repugnantia. de reg. iur. ff. & ibi Cagnol. limitans eand reg. gloſſ. in d. §. impoſſibilis. adde Petr. Duen. Tract. reg. & fal. verb. conditio: vbi tradidit tres limitationes.

n) Infr. ead. part. §. 11.

repugnancie be not in ſuch ſort but that it maie be reconciled, it hurteth not the diſpoſition[o]: And therefore if the executor doo name two executors, for example, his ſon and his daughter with a condition or prouiſo that his daughter doo not adminiſter: albeit here ſeeme a repugnancie in the aſſignation of the daughter, for that it is the office of euerie executor to adminiſter: yet becauſe the ſame may be reconciled, the daughter is to be admitted to the executorſhippe, namelie, to proſecute anie action, though not to adminiſter further of any goods wherof they are in poſſeſſion or which ſhal after be by action ſo recouered[p].

o) Cagnol. in d. L. vbi repugnantia. de reg. iur. ff.

p) Brook Abridg. tit. executor. n. 2.

The eleuenth limitation is, when the vnhoneſt condition is referred to the time paſt, for then it is not reiected, but doth either preſently cõfirme or infirme[q] the effect of the diſpoſition.

q) Couar. Tract. de ſpõſal. part. 2. c. 3. §. 1. n. 9.

Now that we haue ſeene the limitations of the firſt rule, let vs take a viewe of the limitati-
19 ons of the ſecond rule, which is that, *when † the condition is poſsible, the effect of the diſpoſition is ſuſpended, vntill the condition bee accompliſhed*. So that he which is made executor or to whom anie thing is bequeathed vnder ſuch condition, can not be admitted to the executorſhippe, nor obtaine the legacy in the meane time[r]: In ſo much that it is not enough to perform the condition by an other equiualent meanes, but it muſt be accompliſhed in that preciſe manner and forme of the condition, without varyinge in anie one iot[s].

r) L. qui hæred. de cond. & demon. L. ſi quis ſub conditione. Si quis omiſſ. cauſa. teſta. L. cedere diem. de verb. ſig. ff. Graſſ. Theſaur. co. op. §. legatũ. q. 52. Simo de Prætis. de interp. vl. vo. li. 5. Interp 2. dub. 2. n. 109.

s) L. qui hæredi. L. Meuius. de cond. & demon. ff.

20 The firſt limitatiõ of this 2 rule is this † when

it dooth not ſtand by the executor or legatary wherefore the conditon is not performed: for then it is accounted to be accompliſhed[t]. An other limitation is this, when the conditiõ is negatiue, for there the executor or legatary may in the mean time be admitted to the executorſhip, or recouer the legacy entering firſt into bond to make reſtitution, if the condition be not performed[v].

The third limitation is when the condition was once accompliſhed, though it do not continue[x].

The fourth limitation is, when the condition is poſſible in reſpect of facte but not lawful[y].

But † for as much as none of theſe concluſions dooe proceede ſimplie or indiſtinctlie, I thought good to examine euery of them ſeuerally and at large, namely; 21

Firſt whether euery poſſible condition ought to be obſerued preciſelie and *ad vnguem*[a].

Secondly, whether it be ſufficient for the executor or legatary that it ſtande not by them, wherefore the condition is accompliſhed[b].

Thirdly, when and in what caſes the executor or legatarie is to be admitted to the executorſhip, or may obtaine his legacie before the accompliſhment of the condition by entringe into bonde[c].

Fourthly, whether it bee ſufficient that the condition was once performed, though it doo not ſo endure[d].

Fiftlie, whereas it may be doubted of diuers conditions, whether they bee lawfull or no: I haue

t) c. Imputari. de reg. iur. lib. 6.

v) L. Mutianæ ff. de cond. & demon.

x) L. in ſubſtitutione. ff. de vulg. ſub.

y) L. filius. ff. de cond. inſtituc. ſupra ead. par. §. 5.

a) Infr. ead. part. §. 2 x.

b) Infr. ead. part. §. 8.

c) Infr. ead. part. §. 9.

d) Infr. ead. part. §. 10.

haue declared how farre the ſame be lawfull or vnlawfull [c].

c)Infr.ead.part.§§. 11,12,13.

Vnto the which queſtions I haue alſo added theſe following.

Within what time the condition maie or muſt be accompliſhed, when no certaine time is limited by the teſtator [f].

f)Infr.ead.part.§.14.

Than how that vſual conditiõ (*if he die without iſſue*) is to be vnderſtood, or when it is ſaid to be accompliſhed [g].

g)Infr.ead.part.§.15.

Finally, what order is to bee taken concerning the adminiſtration or poſſeſſion of the goodes of the deceaſed, whiles the condition of the inſtitution of the executor dependeth vnaccompliſhed [h].

h)Infr.ead.part.§.16.

Whether euerie poſſible condition ought to bee obſerued preciſelie.

1 *Conditions are of a ſtrict interpretation.*
2 *Conditions inducing a forme are to bee obſerued preciſelie.*
3 *Examples hereof.*
4 *When the teſtator dooth reſpect the ende it skilleth not of the meanes.*
5 *Voluntarie conditions are to be obſerued preciſelie, not neceſſarie conditions.*
6 *He in whoſe fauour the condition is made, may cõſent to other meanes.*
7 *The condition of paiment to be made to the infante is ſatisfied by paiment to the tutor.*

8 *In ſubſtitutions it ſufficeth that the condition be effected by other equiualent meanes.*

9 *In fauour of libertie or of godlie vſes the condition needc not to be preciſelie obſerued.*

10 *Whether the condition may be performed by an other perſon then him that is named in the condition.*

11 *Where the lawe alloweth other meanes the preciſe forme neede not to be obſerued.*

§. vij.

FOr as much † as conditions are ſaid to be of a ſtrict interpretatiõ [a], and to induce a forme to euerie diſpoſition, whereunto they are ioyned [b], vnto which forme nothing maie bee added, nothing detracted, nothing altered [c]. Therfore it is holden for a rule that † euerie poſſible condition ought to bee preciſelie obſerued, neither is it ſufficient (but in ſome caſes) to accompliſhe the ſame by any other meanes, or in any other manner then is preſcribed. For † example, the teſtator maketh thee his executor, or giueth thee a hundred pound if thou ſhalt giue to A.B. tenne pound, thou not knowing of the teſtators will, dooſt of compaſſion or good will giue tenne pound to A.B. becauſe he is poore, and thou art riche: In this caſe thou ſhalt not bee reputed to haue accompliſhed the condition, becauſe thou being ignorant of the diſpoſition, diddeſt it not with a minde or purpoſe to ſatisfie the condition [c]:

1

2

3

a) Michael. Graſſ. Theſaur. com. op. §. legatũ. q. 52. n. 1.

b) Bald. in Authen. vt liceat C. quãdo Mul. Tut offic. Fung. Tiraquel. de retract. §. 1. gloſſ. 21. n. 13.

c) Tiraquel. de retract. §. 1. gloſſ. 11. n. 11 Peckius in c. cùm nom. de reg. iur. in 6. n. 6.

d) Graſſ. Theſaur. com. op. § legatum. q. 52. vbi atteſtatur de communi opinione.

e) Gloſſ. & DD. in L. ſi quis hæredem. C. de Inſtit. & ſub. & hæc eſt communis opinio, vt per Michael. Graſſ. d. §. legatum. q. 52. n. 3.

on: Neuertheleſſe, if thou diddeſt firſt knowe of the condition, thou art preſumed to haue giuen the tenne pound with a minde to perform the condition, vnleſſe the contrarie doo appeare[f]: So that it is not neceſſarie to proteſt or to affirme by words, that thou diddeſt giue the tenne pound with a minde or intente to perform the cõdition, ſeeing the ſame is preſumed vnleſſe the contrarie be prooued[g]. An other example to the ſame effect is this, the teſtator maketh thee his executor or giueth thee a hundred pound if thou paie tenne pound to C.D. before a certaine time, within which time C.D. dieth, and thou paieſt the ſame tenne pound within the ſame time, to the executor or adminiſtrator of C.D. in this caſe the condition is not ſaid to be performed, and ſo thou canſt not bee executor nor obtaine the legacie of a hundred pound, becauſe thou diddeſt not pay the tenne pound to C.D. himſelfe, for the paiment ought to haue beene made to C.D. himſelfe[h], and not to his executors or adminiſtrators.

f) Bar. & Paul. de Caſt. in L. 2. de cond. & demon. ff.

g) Bar. & Paul. de Caſt. in d. L. 2.

h) L. ſub diuerſis. §. vlt. & ibi Bar. de cond. & demon. ff. Mantic. de coniect. vlt. vol. lib. 11. tit. 17. n. 25. & hoc quidem ſine difficultate in hærede legatarij, quia hæredi legatarij ſolutio fieri non poteſt per d. § vlt ſed an idem iuris ſit in hærede hæredis, quæſtio eſt magis dubia, de qua legendus eſt Mantic. vbi ſupr.

4 The firſt limitation of this foreſaid rule is, † when it dooth appeare that the teſtator hath more reſpect to the end, then to the meanes; for then it is ſufficient that the teſtament be accompliſhed, although in other manner then it is expreſſed in the condition[i].

5 The ſecond limitation is, when † the condition is not voluntarie, but neceſſarie: for in neceſſarie conditions it skilleth not, whether the ſame bee accompliſhed in that manner expreſ-

i) Mantic. de coniect. vlt. vol. lib. 11. tit. 16. n. 3

sed by the testator, or in anie other good manner[k].

k)Bar.in L.Gallus.§. quid si tantum.n.2. de lib.& posthu.ff. Graff.Thesaur.com.op. § legatum.q.52.Simo de Prætis.de interp. vlt.vol.lib.1.in fin.vbi etiam respondit quænam conditio sit dicenda necessaria,vel voluntaria.

The third limitation is, when † the person in whose fauour the condition was made, doth consent that the same bee accomplished in other manner; [l] for example, the testator maketh thee his executor or giueth thee a hundred pound, if thou giue to A.B. tenne pound: So it is that A.B. did owe vnto thee tenne pound,& is contented to be released of that tenne pound which he oweth, in steede of that tenne pound which he is to receiue: In this case the condition shall bee accompted for accomplished, as if the tenne pounde had beene reallie paide[m]. These three limitations (especiallie the first of them,) be so generall, that they maie seeme to comprehend the residue of the limitations, neuertheless it shall not be amisse, if I expresse them for the better vnderstandinge of those former limitations. 6

l)Simo de Prætis.de interp.vl.vo.lib.1.soluc. vlt.n.34.

m)Simo vbi supr.licet ortasse contrarium obtineat in cõtractib', attenta dispositione huius regni Angliæ. Perkins.tit.condit. fol.146.

The fourthe limitation therefore † is this, when that is paid to the tutor, which is limited to the childe: [n] for example, thou art made executor, or a hundered pounde is bequeathed to thee, if thou pay vnto the testators son (being an infant) tenne pound: in this case the condition is sufficientlie performed, if paiment bee made to the tutor of the childe[o]: especiallie if the monie be conuertede to the benefitte of the child[p]. And albeit this condition may bee saide to be a voluntarie condition, because it dooth consist in giuing, yet in this case the testator is presumed to haue more regard to 7

n)L si fundus.ff.de cond.& demon.

o)d.L si fundus.Graff. d.§.legatum.q.52.Mãtic.de coniect.vlt.vol. lib.11.tit.17.n.29.

p)Bar.in d.L.si fundus. Mantic.d.tit.17.n.29.

the

the condition, namelie, the benefit of the child, then to the forme of the condition: For if paiment ſhould be made to the childe, it might eaſily be cõſumed & do the childe little benefit [q], and therefore better for the childe, and more agreeable to the meaning of the teſtator, and more ſafe for him that paieth the monie, to pay the ſame to the tutor, rather then to the infante [r].

q) Mantic. vbi ſupr.

r) Alciat. de verb. ſignif. lib. 3. col. 81. in fin.

8 The fifte limitation is † in vulgar or common ſubſtitutions, for then it is ſufficient likewiſe that the condition bee effected by other meanes, then according to the ſtricte forme of the condition [s]. For example, the teſtator maketh his ſonne executor, and if he will not, hee doth ſubſtitute thee executor in his ſteed if the teſtators ſonne can not be executor, in this caſe thou ſhalt be executor, as if he had refuſed to be executor, although reſpecting the forme of the cõdition thou art ſubſtitute onely in caſe the other will not, and not in caſe he cannot: the reaſon is, becauſe in ſubſtitutions the lawe preſumeth that the teſtator dooth more regarde the effect, then the forme of the condition [t].

s) Paul. de Caſtr. in L. ſi magiſter. C. de Inſtit. & ſub. n. 2. in fin.

t) Paul. de Caſtr. vbi ſupr. Alciat. de verb. ſignif. lib. 3. reg. 4. q. 2.

9 The ſixt limitation is † in fauour of libertie, that is to ſaie, when the lord or ſoueraigne by his teſtamente graunteth vnto his villeine or bond-man freedome vpon ſome condition [v].

v) Bar. in L. Mœuius de cond. & demon. ff.

The ſeuenth limitation is when that which is left conditionallie is to be diſtributed in *pios vſus*: for in theſe two limitations it is ſufficient, that the condition be effected by other equi-

ualent

valent meanes, though not according to the precise literall forme of the condition x).

x)Bar.in d.L.Mœuius. cum addic.ibid.

The eight limitation is, when † the condition which consisteth in giuing, is performed by another person, then by him (yet for him) who is named executor, or to whom anie thing is giuen vpon condition, if hee giue to an other: In which case it is all one, as if he himselfe had giuen the same y). 10

y)Bar.in L.Arethusa. de stat.hom.ff.& in L. fin.de cond.instit ff.atque hoc est magis cõmune, teste Mantic.de coniect.vlt.vol.lib.11. tit.17.n.10.

The ninth limitation is, when the condition can not be performed in such manner as is prescribed in the condition: as for example, the testator giueth a summe of money if so manie sermons be made in such a church within such a time, during which time the church is interdicted, by occasion whereof the condition can not be accomplished: In this case the disposition is not absolutly void z), but the monie maie be conuerted to some godlie vse a).

z)L.legatum.de administr.rerum.ad ciuit. pertin.ff.
a)Simo de Prætis.de interp.vlt.vol.lib.1. in fin.

The tenth limitation is, † when the law doth interprete it, as if it were precisely obserued, as maie appeare in the next question b). 11

b)Infr.§.proxim.

Whether the condition bee accompted for accomplished in lawe, when it dooth not stand by the executor or legatarie wherefore the same is not accomplished.

1 *No man to be punished but such as be faultie.*
2 *He is not reputed faultie in lawe who dooth what he can.*

3 *Whe-*

3 Whether the condition be reputed for accompliſhed if it ſtand not by the partie.
4 Certaine diſtinctions about the former queſtion.
5 Arbitrarie conditions are accompted for accompliſhed if it doo not ſtand by the partie.
6 The reaſon of the former concluſion.
7 Arbitrarie conditions are not accompted for accompliſhed where the partie is in fault.
8 Caſuall conditions are not reputed to bee accompliſhed before the euent.
9 The reaſon of the different effect, betwixt caſuall & arbitrarie conditions.
10 Certaine caſes wherein caſuall conditions be reputed as accompliſhed, albeit the ſame bee not ſo in deede.
11 In mixt conditions this conſideration is firſt to be had, how the impediment commeth.
12 The impediment in mixt conditions maie happen diuers waies.
13 When it ſtandeth by him by whom the condition is to be preformed, the ſame is not reputed for complete.
14 What if after firſt refuſall hee conſent, and then the other partie is willing.
15 A reſtraint of the laſt poſition.
16 When it ſtandeth by the party in whom the condition is to bee performed, the ſame is not reputed for complete.
17 A limitation of the former concluſion.
18 When the teſtator dooth hinder the performance of the condition, it hurteth not the executor or legatarie.
19 When a third perſon dooth hinder the performance

maunce of the condition, whether it hurt the executor or legatarie.

20 *The accompliſhment of the condition beeing hindred by caſuall meanes, whether it hurt the executor or legatarie.*

§. viij.

IT agreeth † with equitie and humanitie that no man be puniſhed, or depriued of his righte without his fault [a], and it ſeemeth that † hee is not in faulte, but worthie to bee excuſed, who dooth whatſoeuer lieth in him for the accompliſhing of that which is impoſed vpon him [b], wherefore no meruaile if at the firſt viewe it ſeeme true, that when it doth not ſtand by the executor or legatarie, wherefore the condition is not performed (they dooing whatſoeuer in them lieth for to accompliſh the ſame;) that then the ſame ſhould be accompted as it had beene fullie performed [c]. And in deed ſo it is † regularlie for the moſt parte verie true that when it dooth not ſtand by him to whom it appertaineth, wherefore the condition is not accompliſhed, it ought to be accompted as if it were performed: [d] but this rule dooth not take place perpetuallie. 1 2 3

Wherefore † if wee will vnderſtande when this rule dooth hold or faile, wee are to call to minde ſome of the former diſtinctions or diuiſions of cõditions [e], eſpecially this: That of conditions ſome be *arbitrary*, ſuch as the law preſumeth 4

a) c. ſine culpa. de reg. iur. 6.

b) Peckius. in c. imputari. de reg. iur. 6.

c) c. cùm non ſtat. c. imputari. de reg. iur. lib. 6.

d) d. c. cùm non ſtat. d. c. imputari. de reg. iur. lib. 6.

e) Supr. ead. part. §. 5.

meth to be in the will and power of the man to whom they are impoſed [f]: Some be *caſuall*, ſuch as are not in the power of that man to whome they are impoſed, but either in the power of ſome other thing, or perſon, ſo that the euent thereof is to vs vncertaine [g]: and ſome be *mixte* conditions ſuch as doo conſiſt partlie in our owne power, and partlie in the power of ſome other thing or perſon [h], for example of which ſeuerall conditions I referre the reader to thoſe former which I haue there ſet downe [i].

5 When † the cõdition is meere *arbitrarie*, then if it ſtand not by him, by whom the condition is to be performed, the lawe reputeth the ſame as if it were fully accompliſhed, though in deed it remaine vnperformed: [k] for example, the teſtator ſdooth make thee his executor, or giueth thee a hundred pounde if thou goe to church on Eaſter daie [l], that daie beeing come; by reaſon of ouerflowing of waters or ſome other neceſſarie impediment, thou arte not then able to goe to the church being otherwiſe willing to goe, if thou haddeſt not been hindered. In this caſe thou art to bee admitted executor, and maieſt recouer thy legacie, as if thou had-
6 deſt gone to the church that daie [m]; the † reaſon wherefore the condition is accompted for accompliſhed in lawe, albeit reſpecting the facte it is not accompliſhed, I ſuppoſe to be this, becauſe the teſtator is preſumed to haue more regard to thy good will and indeuour, in theſe conditions which be within thy power, then to the euent of the conditiõ [n], ſo that by ſatisfying

f) L. vnic. §. ſin autem. C. de cad. tollend. Vigli. & Minſing. in §. Pen. Inſtit. de hæred. inſtit.

g) d. §. ſin autem.

h) d. §. ſin autem. Vigl. & Minſing. vbi ſupr.

i) Supr. ead. part. §. 5.

k) L. quæ ſub conditione. §. 1. ff. de cond. Inſtit. Bar. in L. 1. C. de Inſtit. & ſub.

l) Hoc eſſe exemplum põtatiuæ conditionis, patet ex Sichardo in Rub. de Inſtit. & ſub. C. n. 9. & Minſingero, in §. Pen. Inſt. de hæred. inſt. n. 2. quorum alter profert exemplum eundi Francfordium, alter eundi Biſcanum: reliqui ferè omnes inſtant in hoc exemplo, ſi aſcenderis capitolium. DD. in d. §. ſin autem. C. de cad. tol. & in d. §. Pen. Inſtit. de hæred. inſtituend.

m) d. L. quæ ſub. conditione. §. 1. ff. de condic. Inſtit. & c. imputari de reg iur. 6.

n) Sichard. poſt Bar. & Bald. in d. L. 1. C. de Inſt. & ſub.

ing the expectation of the teſtator, thou haſte alſo ſatisfied the exaction of lawe[o].

o)DD.in d.L.1.

Howbeit † euen there alſo where the condition is arbitrarie, and where the teſtator doth as it were accepte good will for a full performance, if he by whom the condition is to bee performed, were in fault, by occaſion of which fault the condition can not in deede be accompliſhed, though perhappes the partie wold willinglie performe the ſame if hee then coulde, there the ſame condition is not reputed to bee performed in fiction of lawe[p]: for example, the teſtator maketh A.B. his executor or giueth him a hundred pound, if hee goe to the church on ſuch a daie: vpon the which daie A.B. intending to accompliſh the condition, proceedeth towards the church, and as he is going committeth ſome crime or offence, whereupon he is areſted and ſtaied, ſo that hee can not goe to the church according to his purpoſe: In this caſe the condition is not accompted for accompliſhed, for that he, by whom the cõdition was to be accompliſhed[q], was himſelfe in the faulte, and the cauſe wherefore the ſame was not accompliſhed. So it is if the condition can not bee performed, by the negligence or delaie of the perſon, by whom the ſame ought to haue been performed[r]: and although an impediment is ſaid to excuſe a man from delaie[s], yet when the impediment maie bee foreſeene and preuented, ſuch impediment ſhal not excuſe him which dooth not auoid the ſame[t]. If thou craue an exãple, let this be the ſame, the teſta-

7

p)Mantic.de coniect. vlt.vol.lib.11.tit.16. n.24.poſt Bar.& Bald. in d.L.1.C.de Inſtit. & ſub.

q)Bar.& Bald.vbi ſupr. gloſſ in c.imputari de reg.iur.6.Aymo Crauetta.conſil.202.n.8.

r)Bar.in d.L.1.Mantic. de coniect.vlt.vol.lib. 11.tit.16.n.14.

s)DD.omnes in L. quod te ff.ſi cer.Pe.

t)Gloſſ.& DD.in d.L. quod te. Zaſ.poſt alios in L.continuus.§.illud. ff.de verb.ob.

teſtator maketh thee his executor, or giueth thee a hundred pound if thou go to the church within two monthes, during the firſt moneth thou dooſt not goe, duringe the ſeconde thou knoweſt thou ſhalt not be able to goe by reaſon of ſome impediment, be it by occaſion of warres, or of the weather, or of the waie, or of ſome infirmitie in thy owne bodie and then being letted, thou makeſt an offer to goe, and dooſt proteſt that it doth not ſtand by thee, and that thou wouldeſt goe if it were poſſible: Neither this proteſtation nor this impediment wil relieue thee becauſe thou diddeſt wittinglie fal into theſe difficulties, and wouldeſt not goe when thou mighteſt ſafelie haue gone[v]. When

§ † the condition is meere *caſuall*, the ſame is neither accõpted for accõpliſhed or extant in preſumption or fiction of law, neither yet for vnaccompliſhed or deficient, vntill the actuall euent of the ſame condition doo firſt come to paſſe[x]: And therefore if the teſtator make thee his executor or giue thee a hundred pounde, if the king of *Spaine* die this yeere[y]: In this caſe vntill the euent do indeede declare whether[k] the K. die this yeare or no, the cõdition is neither accompted for extant or deficient, but is ſuſpended[z]. And if he die, then is the condition ſaid to be purified or extant, and ſo thou art to bee admitted, otherwiſe not[a]. So there is a great difference, whether the condition be arbitrarie or caſuall, for the one is diuers times accompted for accompliſhed in law though not in fact: but the other is not accõpted for accompliſhed

v) c. Mona. de regiur. 6. Zaſ. in d. §. illud. n. 6. fall. 4. & Peckius in L. fin. ad L. Rhodiam. de iactu.

x) L. vnic. §. fin autem. C. de cad. tol. & ibi Bar

y) Vigli. & Minſing. in § pen. Inſtit. de hæred. inſtituend.

z) Sichard. in Rub. de inſtit. & ſub. C.

a) L. vnic. §. fin autem. C. de cad. tol.

or extant in law, vnleſſe the ſame be accompliſhed in fact alſo[b]. The † reaſon of the difference 9
is partlie ſhewed before; for in arbitrarie conditions the teſtator is preſumed not to exacte more then he maie eaſilie performe, on whom ſuch condition is impoſed[c], and ſo it is ſufficient that it ſtand not by him, that the ſame condition is not performed: But here in caſuall conditions, for as much as the teſtator dooth not referre it to that which is in his power on whom the condition is laide, therefore the teſtator is thought to referre the force or effect of this diſpoſition, to the determination of fortune[d], (or rather to ſpeak more chriſtianlie, to the will of God,) and therfore this euent of gods wil muſt decide the doubt, I mean whether hee that is appointed vnder ſuch condition ſhall bee executor or not, or obtaine his legacie or not. Notwithſtanding † ſomtimes e- 10
uen in caſuall conditions, it is ſufficient that it dooth not ſtand by the executor or legatarie, wherefore the ſame condition is not accompliſhed, like as in arbitrarie conditions[e]. The firſt caſe is, where the teſtator would haue ſo diſpoſed howſoeuer the condition ſhould fall out[f]. The ſecond is when by his facte, the accõpliſhment of the condition is hindred, to whom it is beneficiall that the ſame ſhoulde neuer bee performed[g]. The third caſe is in fauour of freedome or libertie from ſeruitude[h].

If we † will knowe when a *mixt* condition 11
is reputed in lawe to be accompliſhed, albeit in facte

b) Eod §. ſin autem.

c) Sichard. Bar. Bald. & ferè omnes interp. in L. 1. de inſtit. & ſub. C.

d) Paul. de Caſtr. in L. quæ ſub conditione. ff. de condic. inſtitu.

e) Mantic. de coniect. vlt. vol. lib. 11. tit. 16. n. 15.

f) Gloſſ. in L. 1. C. de inſtit. & ſub.

g) L. iure ciuili. ff. de cond. & demon.

h) L. fin. C. de neceſſar. inſtituend.

fact the ſame be not performed, we muſt conſider by what meanes the impediment is mini-
12 ſtred, namelie † whether it proceede from the *perſon by whom* the condition is to bee performed, or from that perſon *to whom* the condition is to be performed, or from *the teſtator himſelfe* who deuiſed the condition, or from ſome *other third perſon*, or whether it happen by ſome *other meanes* according to the ſecrete purpoſe and will of God, which wee no leſſe fooliſhlie then commonlie, call *Chaunce or fortune.*

13 When † he that is made executor, or to whom a legacy is giuen vpon a mixt condition, is him ſelfe the onelie cauſe wherefore the condition is not performed; then worthilie is the ſame condition not to be accompted for accompliſhed[i]: for example, the teſtator maketh thee his executor or giueth thee a hundred pounde if thou marie his daughter; thou refuſeſt ſo to do; with great reaſon is the condition not reputed for performed, and ſo thou canſt not be execu-
14 tor nor obtaine the legacie[k]: In ſo much † that albeit afterwards thou become willinge, and doeſt offer to marie her, and ſhe then refuſe this thy offer, and ſo it dooth nowe ſtande by her and not by thee, that the condition is not performed: Neuertheleſſe thou canſt not reape anie benefit by her refuſall, becauſe thou haddeſt broken the condition before, whereby thy right paſſed awaie and was extinguiſhed, and ſo thy repentaunce is nowe too late[l]: Vnleſſe † at ſuch time as thou diddeſt refuſe, thou then couldeſt not marie, for that perhappes at that

i) L. in teſtō. el. 2. ff. de cond. & demon. Mantic. de coniect. vlt. vol. lib. 11. tit. 18. n. 37.

k) Bar. in d. L. in teſta. Sichard. in L. 1. C. de inſtit. & ſub.

l) Iaſ. in d. L. 1. de Inſtit. & ſub. C. n. 7. & Sichar. in eand. L. n. 9. & eſt cō. op. teſte Graſſ. Theſaur. com. op. §. legatum. q. 46. n. 16. poſt Dec. in d. L. 1. n. 13. quam ſententiam intellige vt p Molin. in addic. ibid.

time thou were not of ſufficient age to marrie, for thy diſſent at that time when thou couldeſt not conſent, dooth not hinder thee [m].

m) L. eius eſt nolle. de reg. iur. ff.

When † the condition is not performed 16
by his meanes onelie, vnto whom or in whoſe perſon the ſame is to be accompliſhed, then it is reputed in law as if it were fulfilled in deed [n]: for example, the teſtator maketh thee his executor, or giueth thee a hundred pounde if thou marie his daughter, thou arte willing and dooſt offer her mariage, which ſhee refuſeth: In this caſe the condition is reputed for complete, and ſo thou maieſt recouer the executorſhip or legacie [o]. Notwithſtanding if † the wordes of the 17
condition be directed vnto her, not vnto thy ſelfe: as for example, the teſtator maketh thee his executor or giueth thee a hundred pound, if his daughter marie thee. In this caſe if ſhe do refuſe, and it dooth not ſtand by thee, the condition is not reputed for accompliſhed [p], vnleſſe it were the meaninge of the teſtator, that thou ſhouldeſt haue the benefit of the diſpoſition, in caſe of this her refuſall [q]. And yet there is no great difference betwixte the one Phraſe and the other, for the teſtator in ſaying, if thou marrie her, dooth neceſſarilie vnderſtand therby, if ſhe alſo bee content to marie thee, for thou canſt not doo the one, vnleſſe ſhe alſo do the other [r], and therefore this limitation is ſuſpected of ſome not to bee ſounde [s], notwithſtandinge it is more generallie approoued and rather admitted then the contrarie opnion [t]: what if the teſtator make A.B. his executor, or

n) L. Titio centum. §. Titio. ff. de cond. & demon.

o) d. L. Titio. §. Titio.

p) Mantic. de coniect. vlt. vol. lib. 11. tit. 18. n. 37.

q) L. iure ciuili. ff. de cond. & demon.

r) Socin. in d. L. in teſtō. Mantic. de coniect. vlt. vol. lib. 11. tit. 8. n. 37.

s) Michael Graſſ. Theſaur. com. op. §. legatū. q. 46. n. 17.

t) Alex. in L. 1. C. de Inſtit. & ſub.

giue

giue him a hundred pounde if hee marie his daughter, and at the firſte A.B. is willinge and offereth to marrie her, but ſhee refuſeth; afterwarde ſhe is willinge, but he refuſeth: whether in this caſe is the cõdition ſaid to be complete: this queſtion is ſatisfied afterwardes [v].

v) Infr. ead. part. §. 10. in fin.

18 When † the impediment dooth proceede from the teſtator himſelfe, then the condition is reputed for complete: as for example, the teſtator dooth make thee his executor, or giueth thee a hundred pounde vpõ condition, if thou bury his bodie within the Cathedral church of Saint Peter at Yorke: the teſtator dieth excõmunicate (becauſe he refuſeth to come to the church, or becauſe he is an Heretike or Sciſmatike, a manifeſt vſurer, or for ſome other like cauſe) for the which his ſepulture in that caſe is denied: Seeing in this caſe it doth not ſtand by thee, but by him, wherefore the condition is not complete, it ſhall not preiudice thee, but that thou maieſt be admitted to the executorſhip or obtaine the legacie, as if thou haddeſt in deede performed the condition [x].

x) DD. in L. milites. §. vlt. Ad L. Iul. de adul. ff. Sichard. in L. 1. de Inſtit. & ſub. C. n. 1.

19 When † the impedimente dooth proceede from a thirde perſon, then I ſuppoſe the condition to bee accompted in lawe for accompliſhed [y]: For example, the teſtator maketh thee his executor, or giueth thee a hundred pounde if thou mary his daughter within a moneth, during which moneth, a thirde perſon dooth purpoſelie holde her from thee, ſo that thou canſt not marie her within the time preſcribed: In this caſe the condition is reputed to bee ac-

y) Bar. in L. in teſtõ. cl. ff. de co. d. & d. mon.

compliſhed, and ſo thou maieſt obtaine the executorſhip or legacy, as if thou hadſt maried her within the ſaid time [z]. But if the thirde perſon doo not purpoſelie detaine her, beeing ignoraunt peraduenture of the teſtators will, then it ſeemeth that the condition is not reputed for complete [a].

When † the impediment dooth not ariſe by anie of the meanes aforeſaide, but by caſuall meanes (as we tearme it) when it proceedeth from the wil and prouidence of almighty God, the law dooth not accompt that condition for complete [b]. And therefore if the teſtator make thee his executor, or giue thee a hundred poũd if thou mary his daughter, and ſhe dieth before thou haſt married her: in this caſe the condition ſhall not be accomted for accompliſhed or extant, but contrariwiſe (as it is indeede,) vnperformed and deficient, ſo that thou canſt not receiue anie benefit by that conditionall diſpoſition [c]: for where the performaunce of the condition is hindred by the will and prouidence of God, whereunto the teſtator made relation, there the law dooth not allowe anie feined performaunce [d], except it bee in fauour of libertie from bondage [e], or of alimentation or in a diſpoſition [f] *ad pias cauſas* [g], or excepte the condition be not conditionall but modall [h], for (*conditio*) and (*modus*) doo greatlie differ, as in the next paragraphe is declared.

Whether

z) Bar. in d. L. in teſtõ. Bald. & Alex. in L. 1. de Inſtit. & ſub. C. & hoc ego quidem procedere puto in hoc regno, etiamſi ille tertius iniuſtè detineat mulierem: cùm apud nos Honoratus non habeat aliquam actionem contra iniuſtum illum detentorem, pro damno, ſeu intereſſe. Videant autẽ Iuſtinianiſtæ Manticã. de coniect. vlt. vol. lib. 11. tit. 16. n. 22.

a) Bald. Alex. & DD. in L. 1. C. de Inſtit. & ſub. Mantic. de coniect. vlt. vol. lib. 11. tit 16. n. 22.

b) Hen. Boic. in c. ſicut ex literis. de ſponſ. extr. Bar. in L. 1. C. de Inſtit. & ſub.

c) Gloſſ. & Dyn. in c. imputari de reg. iur. 6. Sichard. & alij DD. in d. L. 1. C. de Inſtit. & ſub.

d) Mantic. de coniect. vlt. vol. lib. 11. tit. 16. n. 23

e) L. libertatem. ff. de manumiſſ. teſtõ. Couar. in c. 3. de teſta extr.

f) Sichard. in L. 1. C. de Inſtit. & ſub. n. 6. in fin.

g) Tiraquel. de priuil. leg. piæ cauſæ. c. 57.

h) Graſſ. Theſaur. com. op. §. legatum. q. 58. n. 4. & hæc opinio communiter approbatur. Alex. in L. 1. de Inſtit. & ſub. C.

Whether hee that is made executor, or to whom anie legacie is giuen conditionally, may in the meane time, whiles the condition dependeth, be admitted to the executorſhip, or obtaine the legacie, by entring into bondes to performe the condition, or elſe to make reſtitution.

1 *Diuers kindes of conditions to bee remembred in this queſtion.*
2 *When the condition is affirmatiue it ſufficeth not to put in bondes.*
3 *What if the affirmatiue doo alſo implie a negatiue.*
4 *What if the diſpoſition be made* ſub modo, *and not* ſub conditione.
5 *How* Modus *and* Conditio *doo differ.*
6 *When the teſtators will is not repugnaunt, then it ſufficeth to put in bonde.*
7 *If the condition be negatiue, then what thinges are to be regarded?*
8 *If the condition conſiſt in not doing, then it is materiall, whether the ſame maie be accompliſhed during life.*
9 *If the condition can not bee accompliſhed during life, then it ſufficeth to put in bonde, to the effect aforeſaid.*
10 *Example of ſuch condition as can not be accompliſhed during life.*
11 *The reaſon of deuiſing this bond, and who was the*

inuentor thereof.

12 *Certaine caſes wherein the legacie maie be obtained without bonde, beeing giuen vpon condition, which maie ſeeme not to be accompliſhed duringe life.*

13 *If the condition negatiue maie bee accompliſhed during his life, to whom it is impoſed, this caution hath no place.*

14 *A condition negatiue is ſaide to bee accompliſhed when it cannot be infringed.*

15 *Great oddes whether the condition maie bee accompliſhed during his life, to whom it is impoſed or not.*

16 *What if the negatiue condition can not be infringed without ſorrowe.*

17 *If the condition conſiſt in not giuing, then we muſt inquire and reſolue as in the condition of not dooing.*

18 *When the condition dooth conſiſte in not happening, then this bond hath no place.*

19 *The forme of the bonde, to whom it is to be made, and whether ſureties be neceſſarie.*

§.ix.

IF anie † be deſirous to know whether he that is made executor, or to whom anie legacie is left by the teſtator, vnder ſome poſſible conditiō, may in the mean time whiles the condition dependeth vnperformed, bee admitted to the executorſhip, or obtaine his legacie ſo leſte by entring bond or putting in ſufficient 1

ficient caution either to performe ſuch condition, or elſe to make full reſtitution of al things by him receiued: It ſhall be behoofull to call to his remembraunce howe manie kindes of poſſible conditions there be [a], eſpeciallie he muſt not forget, that of theſe conditions ſome bee *affirmatiue*, and ſome bee *negatiue* [b]: and againe, that as wel of the affirmatiue as of the negatiue, there be three ſortes, that is to ſaie, ſom cõſiſt in *chancing*, ſome in *giuing*, & ſome in *dooing*, & on the contrarie, ſome conſiſt in not chauncinge, ſome in not giuing, and ſome in not dooing [c]. Nowe to applie theſe diſtinctions to the queſtion.

a) De quibus. ſupra. cad. part. §. 5.

b) L. in facto. ff. de cond. & demon.

c) d. L. in facto.

2 When † the condition is *affirmatiue* (whether it doo conſiſt in chauncing, giuing, or doing:) he that is made executor, or to whom anie legacie is giuen, vnder ſuch condition, cannot be admitted to the executorſhip, nor demaund the legacie by vertue of the laſt will or teſtament of the deceaſed, ſo longe as the ſame condition dependeth vnfulfilled, or is not extant [d], albeit the executor or legatarie ſhoulde put in ſufficient bond to make reſtitution, in caſe the condition ſhould be deficient: For the euent of ſuch affirmatiue condition is to be expected and muſt be extant, before the diſpoſition of the teſtator can take effecte [e], excepte in
3 theſe caſes following. One is † when the affirmatiue condition which dooth conſiſt in dooing or giuing, dooth with all ſecretlie implie or containe a negatiue [f]: as for example, the teſtator maketh his wife executrix, or giueth her

d) L. Mutian. in ff. de cond. & demon. & gloſſ. ac DD. ibid.

e) L. qui hæredi. ff. de cond. & demon. DD. in d. L. Mutian.

f) L. pater. §. ſocrus ff. de cond. & demon. Bar. & Paul. de Caſtr. in d. L. Mutian. Ripa. in L. ita ſtipulatus. ff. de verb. ob. ff. n. 46.

her a hundred pound, if she abide with his children; which affirmatiue condition, (if she abide with his children) consisteth in dooinge, and dooth withal secretlie implie a negatiue, that is to saie, (If she doo not depart from his children[g]:) and therefore in this case, the executor or legatarie, by entring into sufficient bond to performe the condition, or else to make restitution, is to be admitted to the executorship or maie obtaine the legacie, as if the negatiue had beene expressed[h]. An other case is, when † 4 the disposition is not made *sub conditione, sed sub modo*[i]. For † thou shalt vnderstand, that *conditio* and *modus* doo differ, *Conditio* is a qualitie 5 which so long as it dependeth vnperformed or is not extant, dooth hinder the effect of the disposition, so that, that thinge which is disposed conditionallie, can neither be demaunded, neither is due in the meane time[k]: *Modus* is a moderation, whereby a charge or burthen is imposed, in respecte of a commoditie, which moderation dooth not so farre hinder the effect of the disposition, but that the thinge disposed is due, and maie bee demaunded in the meane time[l]: and it is called *modus* a *moderando.* The one of them is thus knowen from the other, that is to saie, the condition is commonlie knowen by this word (*if*) or by wordes of like value[m], whereof I haue giuen examples before[n]: the meane or moderation is knowen by this worde (*that*) as I make A. B. my executor or giue him a hundred pound, that he maie erect a monument[o]. Nowe in this case when anie thing

g) Bar. & Paul. de Cast. in d. L. Mutianæ. per. d. §. socrus.

h) Bar. & Paul. Castr. vbi supra. Simo de Prætis. de interp. vlt. vol. lib. 5. interp 2. dub. 1. n. 24. 25. fol. 42.

i) L 1. C. de his quæ sub modo. L. quibus diebus §. Termilius. ff de cond. & demon. verum propriè loquendo Cautio de modo implendo, nō est cautio mutiana, sed alia ei similis. Bald. in Auth. cui C. de indict. vid. n. 22. in fin.

k) Bald. & Sichard. in Rub. de Instit. & sub. C.

l) Bar. in d. L. quibus diebus. §. Termilius. de cond. & demon ff. Sichard. in d. Rub. de Instit. & sub. C. Graff. Thesau. com. op. §. legatum. q. 58. Modus (inquit Cuiacius) est finis, propter quem legatur, vel causa legandi collata in futurum. Cuiac. in tit. de his quæ sub mod. C.

m) Bald. & Sichard. in Rub. de Inst. & sub. C.

n) Supra. ead. part §. 5.

o) Bar. in d. §. Termili. & Sichard. in d. Rub. de Instit. & sub. C.

thing is lefte vnder a moderation or with the exaction of a remuneration, that thing which is ſo bequeathed, is preſentlie due and maie now alſo be demaunded, ſo that he which maketh demaunde doo enter into bonde in manner as hereafter is deſcribed, to performe that which is exacted by the teſtator, or elſe to make
6 full reſtitution [p]. An other caſe is, when † the teſtators will is not repugnant thereunto: for then this bonde (as it is affirmed) hath place euen in affirmatiue conditions [q].

p) L. quibus diebus. §. Termilius. ff. de cond. & demon. L. 1. 2. C. de his quæ ſub modo.

q) Bar. in d. L. Mutianæ. de cond. & demon. ff. n. 3.

7 When the † condition is *negatiue*, then wee are to regarde what kinde of negatiue condition it is, that is to ſaie, whether the ſame conſiſt in *not dooing* or *not giuing* or *not chauncing*.

8 If † the condition conſiſte in *not dooing*, then it is material, whether the ſame maie be accompliſhed ſo long as he liueth on whom the ſame is impoſed, yea, or no.

9 If † the condition conſiſtinge in not dooing *can not be performed ſo longe as the perſon, on whome it was impoſed liueth*, then maie hee obtaine the bequeſt, by puttinge in bondes to accompliſhe the condition, or elſe in defect thereof to make
01 full reſtitution [r]: as for † example, the teſtator maketh one his executor or giueth him a hundred pounde, if he neuer plaie at the Cardes or Dice: This condition we ſee is negatiue, it cõſiſteth in not dooing, and it is ſuch a condition withall, as can not be fullie performed, ſo long as hee liueth on whom it is impoſed, becauſe at anie time during his life, hee maie infringe the ſame, by playing at the Cardes or Dice [s], for al-

r) d. L. Mutianæ. & ibi Bar. Bald. & Paul. de Caſtr. Zaſi. in L. dedi tibi. ff. de cond. cauſ. dot.

s) Simo. de Prætis. de interp. vlt. vol. lib. 5. inter. 2. dub. 1. n. 23.

albeit he did abſtaine this daie, yet might hee plaie the next daie, or if not the next daie, yet ſome one daie or other ſo longe as hee had anie daies to liue[t], and ſo in the meane time, that is to ſaie, all his life longe hee ſhoulde not reape anie commoditie by the teſtament, if the full performaunce of the condition were firſt exacted. Wherefore † leaſte the teſtators will ſhould be vneffectuall, and leaſte the executor or legatarie ſhould reape no benefit therby, if the full performaunce of the condition ſhould bee expected, ere the bequeſt coulde bee obtained: one *Mutius Sceuola* did deuiſe this remedie, that hee who is made executor, or to whom anie legacie is bequeathed, vpon a condition negatiue, which coulde not bee fullie performed duringe his life, ſhoulde enter into bonde to performe the condition, (that is to ſaie, neuer to doo that which is prohibited, or elſe to make a full reſtitution) and by that meanes obtaine the executorſhippe, or legacie[u], which bonde or caution is of *Mutius* the author thereof, called *Mutiana cautio*[x], and after a ſorte hath the effecte of the full accompliſhment of the condition[y]. Yea in ſome caſes † the legacie which is giuen vnder a condition negatiue conſiſting in not dooing, maie be obtained without anie ſuch bond, albeit the ſame condition maie be infringed duringe the life of the legatarie, namely, in a legacie of libertie or free-dome from bondage[z], & in a legacie *ad pias cauſas*[a]: The reaſon of the difference is, becauſe in theſe fauorable legacies the teſtator

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is

t) Simo de Prætis. vbi ſupr. Paul. de Caſtr. in d. L. Mutianæ.

u) d. L. Mutianæ. cum gloſſ. ibid. Simo de Prętis. vbi ſupr. Zaſ. in L. dedi tibi. de cond. cauſ. dot. ff. n. 7. 9.

x) Gloſſ. in d. L. Mutianæ.

y) Par. & Caſtr. in d. L. Mutianæ.

z) L. libertatem. L. libertas. §. 1. de manumiſſ. teſta. ff.

a) Tiraquel. de priui. leg. piæ cauſæ. c. 48.

is preſumed to haue meante onelie of the firſte acte when the legatarie had oportunitie of doinge the thinge prohibited[b]: So that if at that ſeaſon or firſte oportunitie, the legatarie doo not infringe the condition by dooing contrarie to the diſpoſition of the teſtator, it is not hurtefull though after that firſt oportunitie paſt the legatarie goe againſt the condition[c], vnleſſe the meaning of the teſtator doo appeare to bee contrarie, viz. that the condition ſhould be extended to euery act during the life of the legatarie[d].

b) Tiraquel. vbi ſupra.
c) Gloſſ. in L. Titio. §. fundus. ff. de cond. & demon. Tiraquel. d. c. 48.

d) L. vlt. de manumiſſ. teſta. ff. Tiraquel. vbi ſupra.

13 But † if the negatiue condition bee ſuche as *maie be performed during his life on whom it is impoſed*, this aforeſaide bonde or caution hath no place[e], and conſequentlie the executorſhip or legacie diſpoſed vnder ſuch condition, ſo long as the ſame dependeth not fullie performed, can not be obtained[f]; For example, the teſtator maketh thee his executor, or giueth thee a C. pound if thou neuer plaie at dice or cardes with A.B. or if thou do not at any time giue away thy lands to A.B. this cõdition howſoeuer it be negatiue, & alſo cõſiſteth in not giuing, or not doing: Yet it may be fullie & perfectly cõplete and performed in thy life time: For A.B. with whõ thou art forbidden to play, or to whõ thou art forbiddẽ to giue thy lands, may die before thee, & then thou canſt not play with him nor giue him thy lands when he is dead, and ſo it is cuident, that this condition may be fullie performed, & accompliſhed in thy life time, for
14 a † negatiue condition is then ſaid to bee fullie accom-

e) L. cum tale. §. 1. ff. de cond. & demon. L. pater. §. ſocrus. eod.

f) L. cũ tale. §. 1. & gloſſ. in d. L. Murianæ.

accompliſhed, when it is brought to an impoſ-
g)Gloſſ.&.DD.in d.L. Mutianæ.ff.de cond. & demon.
ſibilitie[g], and therefore in this caſe thou canſt not be admitted executor nor obtaine the lega-
cie, vntill the condition bee brought into that
h)DD.in d.L.Mutianę. & d.L.cum tale.§.1.Simo de Prætis.de inter. vlt.vol.lib.5.interp.2. dub.1.n.23.
ſtate, that it can not be infringed[h]. Great † ods 15
therefore there is, betwixte thoſe negatiue con-
ditions which can not be performed in the life
time of that perſō, on whom they are impoſed,
& thoſe negatiue cōditions which maie be per-
formed during his life: For there the executor
or legatarie maie obtaine the executorſhip or
legacie by putting in bondes, but here he can
not, vnleſſe it be † ſuch a caſe as the euent there- 16
of dooth bring greefe and ſorrow, to the partie
on whom the condition is impoſed, for in ſuch
caſes where the condition can not be infringed
or become deficient, without ſorrowe or heaui-
nes, it is lawfull for the executor or legatarie to
enter into bondes for making reſtitution, (if
the condition be not performed,) and ſo to be
i)d.L.cum tale.L.pater.§.ſocrus.ff.de cond.& demon.
admitted to the executorſhip, and to obtaine
the legacie in the meane time[i]: as for example,
the teſtator maketh his wife executrix or giueth
her a hundred poūd if ſhe depart not from her
children: This condition maie be extant in the
life time of the mother, for it maie happen the
children to die, & the mother to ouerliue, and
then the condition muſt needes be extant, for
after their death ſhe cannot infring the condi-
tion by departing from them that are not: ne-
uertheleſſe, becauſe the death of the childe is a
harde and heauie thing to the mother, therfore
the lawe is not ſo hard, but that in this caſe the
condi-

condition depending, the mother is to bee admitted to the executorſhip, and maie recouer the legacie vpon bondes, to accompliſhe the condition, or elſe to make reſtitution [k].

k) d.L.cum tale.& gloſſ. in d.L.Mutianæ.

17 When † the condition dooth conſiſt in *not giuing*, then as before, we are to enquire whether the condition be ſuch as the ſame can not be accompliſhed during his life, on whom it is impoſed: for if it bee ſuche a condition, that which is diſpoſed vnder ſuch a condition maie be obtained by entring bonde as before [l]: for example, the teſtator dooth make thee his executor, or dooth bequeath vnto thee a hundred pounde if thou doo not giue awaie thy lands [m], this condition can not bee fullie performed, but by thy death, becauſe ſo longe as thou liueſt thou maieſt giue awaie thy landes, and ſo infringe the condition [n], wherefore leaſt the teſtators will ſhoulde be deluded, or thy ſelfe defrauded, thou maieſt be admitted to the executorſhip or obteine the legacie in the mean time ſo that thou becom bounden as before, to performe the condition or els to make full reſtitution. [o]

l) d.L.Mutianæ.ff.de condic.& demon.

m) L.4.§.idem Iulian⁹. ff.de condic.inſtit.

n) DD.in d.§.idem Iulianus.

o) d.L.Mutianæ. Simo de Prætis.de interp. vlt.vol.lib.5.Interp.2. dub.1.n.23.

18 When † the condition dooth conſiſt in *not chauncing*, then this bond or condition can not be admitted, neither can the thing diſpoſed vnder ſuch condition be obtained before the condition be performed [p]: And therefore (for example) if the teſtator make thee his executor or giue thee a hundred pounde if thy ſhip doo not returne from Spaine, in this caſe the euent of the condition is to be expected. And if it ſo come

p) d.L.Mutianæ.& ibi Bar.& alij.

come to paſſe that thy ſhip dooth returne, then is the condition deficient, and ſo thou canſt not be admitted to the executorſhippe, nor obtaine the legacie by vertue of the ſaide diſpoſition [q]: But if the Shippe can not returne (which thinge maie happen by ſhip-wracke, or by ſome other accident) and ſo all hope or poſſibilitie taken awaie, then the condition is ſaid to be accompliſhed or extant, and ſo thou art to be admitted to the executorſhip, or maieſt recouer the legacie, as if the diſpoſitiō had been ſimple[r].

q) Bar. & Paul. Caſtr. in d. L. Mutianæ. L. vnic. §. ſin autem. C. de cad. tol.

r) Idem Paul de Caſtr. in d. L. Mutianæ. d. §. ſin autem.

Nowe † that wee haue ſeene in what caſes the aforeſaide bonde, hath place, and in what caſe it hath no place, it ſhall not be amiſſe in worde to ſhewe the manner and forme of the bonde and to whom it muſt be made, and whether ſureties be required. The forme therof is this (*not to doo that thing which is contained in the condition, or elſe to reſtore the thinges diſpoſed together with all the meane fruites and profites therof*[s],) the bonde is to bee made by the executor, vnto the ſubſtitute [t], or him that is appointed executor in place of him that is bounde if the condition be not obſerued [v], and if there be no ſuch ſubſtitute, then to the executor [x]; and if there be no executor, then to the ordinarie, becauſe he dooth as it were ſucceede where anie dieth inteſtate [y]: likewiſe the legatarie muſt enter bonde to him that is ſubſtituted vnto him, if there be no ſubſtitute, then to the collegatarie, if there be none ſuch, then to the executor, if there be no executor, then to the ordinarie [z], there neede no ſuretie neither for anie thing

19

s) L. cùm filius. §. qui Mutianam. ff. de leg. 2.

t) Bald. in Auth. cui relictum. C. de Indict. viduitat. n. 20.

v) Bald. in d. Auth.

x) Idem Bald. ibid.

y) Stat. Ed. 3. an. 18. c. 19 vel forte præſtanda eſt huiuſmodi cautio Mutiana adminiſtratoribus caſu, quo adminiſtratio ſit conceſſa.

z) Bald. in d. Auth. cui relictum. C. de Indict. vid.

thing immoueable, nor for a thing moueable, vnlesse the party be not fit or sufficient[a]. a)d. Auth. cui relictum.

Whether it be sufficient, that the condition was once accomplished, though the same doo not continue.

1 *Manie cases wherein it is sufficient that the condition was once accomplished, though it doo not so continue: and contrariwise manie cases wherein it is not sufficient, that the conditiō was once accomplished vnlesse it doo continue.*
2 *The order to be obserued in this diuersitie of cases.*
3 *If the condition be casuall, then it is sufficient that the condition was once accomplished.*
4 *Diuers examples of this conclusion.*
5 *If the condition be arbitrarie, then it is not sufficient that the condition was once accomplished.*
6 *Diuers examples of this conclusion.*
7 *If the condition be mixt, then it is sufficient that the same was once accomplished.*
8 *Example of this conclusion.*
9 *What if the condition endure not by the faulte of the partie by whom it is to be accomplished.*
10 *What if the partie be alreadie maried, to whom anie thinge is bequeathed conditionallie,* (If hee shall marrie.)
11 *What if the executor or legatarie were once willing and afterwardes vnwilling; whether shall the condition be reputed for accomplished?*
12 *In this last Q. either hath diuers authors.*
13 *The opinion of the author of this booke.*

14 *An answer to an obiection.*

15 *Diuers limitations of the former cõclusion, whereunto the author of this booke did subscribe.*

§.x.

MAnie † cases there be wherein it is 1
sufficient for the performaunce of the condition, that the same was õce accõplished, albeit the same do not still endure in the same estate[a]: other cases there be, wherein it is not sufficient once to haue performed the condition, vnlesse there be a continuance of the performance[b].

But becaus̃e it woulde growe to an infinite matter to recite euerie particular case[c], it is meete to set downe some generall conclusions or distinctions, whereunto and whereby al those particular cases maie be reduced and decided.

Firſt † of all therefore we are to enquire the 2
nature of the condition, whether it be *casuall*, *arbitrarie*, or *mixt*[d].

If † the condition *be meere casuall*, that is to 3
saie, such a condition whereof the euente is to vs vncertaine[e], then it is sufficient that the same was once accomplished, though it do not continue still in the same state[f]: as † for example, the 4
testator maketh thee his executor or giueth thee a hundred pounde, if A.B. shall bee proctor of the vniuersitie of Oxforde[g]: nowe if at anie time after the makinge of this will A.B. be proctor, whether after the testators death or before

a) Ias. in L. si quis hæredem. C. de Instit. & sub. vbi tradita est regula non paucis ampliationibus & limitationibus illustrata.

b) Ias. in L. in substitutione. ff. de vulg. & pupil. sub. vbi regulã tradidit sex fallentijs exornatam.

c) Qua in re nimium desudasse videtur Iason. vt refert Ber. Diaz. Tract. reg. & fal. verb. conditio reg. 110.

d) De quibus supr. ead. part. §. 5. & Bar. in L. 1. de Instit. & sub. C. Minsing. & Vigl. in §. pen. Instit. de hæred. instit.

e) Supr. ead. part. §. 5. n. 14. Spiegel. Lexic. verb. fortuitum.

f) L. si quis hæredem. C. de Instit. & sub.

g) d. L. si quis hæredem. cuius exemplum est. Si Titi⁹ fuerit Consul vel Prætor, &c. cui nostrũ exemplum non est dissimile.

fore, or whether hee continue ſtill Proctor or not, it is not materiall[h]: yea though hee were depoſed from his office, it skilleth not, it is ſufficient that once he was Proctor, the condition beeing caſuall, and ſo thou art to bee admitted to the executorſhip, and maieſt obtaine the legacie, as though A.B. were Proctor ſtill[i]. So it is if the teſtator make thee his executor, or giue thee a hundred pound if A.B. ſhall bee Doctor of the ciuill lawe, though afterwardes he be degraded[k]. Likewiſe if the teſtator dooth make thee his executor or giue thee a hundred poũd if his daughter ſhall bee widdowe: In this caſe if his daughter happen at anie time to be widdow, thou maieſt be admitted to the executorſhip or obtaine the legacy, albeit ſhee doe afterward take a new husband[l].

h) d. L. ſi quis hæredem.

i) Sichard & alij in d. L. ſi quis hæredem.

k) Zaſ. in L. in ſubſtitutione. ff. de vulg. ſub. n. 11.

l) Bald. in L. fin. de indict. vid. C. Graſſ. Theſaur. com. op. §. legatũ. q. 53. referens ibi hanc op. eſſe veram, cui concinnit Mantic. de coniect. vlt. vol. lib. 12. tit. 19.

5 If † the cõdition be *arbitrary*, that is to ſay, ſuch a condition as the lawe eſteemeth to be in our power[m]; then it is not ſufficient that it be once
6 accompliſhed, vnleſſe it doo continue[n]: As † for example, the teſtator maketh thee his executor, or giueth thee a hundred pounde if thou paie to A.B. tenne pound, thou paieſt ten poũd to A.B. and when thou haſt ſo doone, thou takeſt it from him againe, this paiment is no paiment, becauſe thou diddeſt not ſuffer the monie to continue with him, and therefore in this caſe thou art worthilie repelled from being executor, or obtaininge the legacie[o]. So it is if the condition doo include a continuaunce of time: as for example, the teſtator maketh thee his executor or giueth thee a hundred pounde,

m) Sichard. in Rub. de Inſt. & ſub. C. Viglius et Minſing. in §. pen. Inſtit. de hæred. inſtituend.

n) Bar. in L. 2. de cond. et demon. ff. Sichard. in L. ſi quis hæredem. de Inſtit. et ſub. C. quorum opinio communis eſt. ex relatione Graſſi Theſaur. com. op. §. legatum. q. 57. n. 3.

o) L. ſi ſoluturus. ff de ſoluc. et Angel. ibid. Sichard. in d. L. ſi quis hæredem. n. 6.

if thou permit A.B. to haue a waie through thy ground: in this caſe it is not ſufficient, that thou permit him to haue a waie or to paſſe through thy groũd for a day or two, but thou muſt ſuffer him ſo longe time as the teſtator hath aſſigned, otherwiſe the condition is not ſaid to be complete[p]. But what if the teſtator make thee his executor or giue thee a hundred pound, if thou giue ten pound to A.B. thou of pitie & cõpaſſiõ giueſt him tenne pound, being ignorant of this conditiõ: whether is it ſufficient that thou didſt once giue him ten pound? In this caſe the condition is not reputed for accompliſhed, and therefore if thou wilt bee executor or obtaine the legacie, thou muſt once againe giue him tenne pound, as elſe where I haue declared[q]: for where the condition is arbitrary, it muſt be obſerued preciſelie[r], vnleſſe it be in ſuch a caſe as it can not be iterated[s]: For example, thou art made executor or haſt a hundred pound bequeathed vnto thee, if thou manumit thy bõdman, or if thou remit to A.B. ten pound which he oweth thee: in which caſe if thou ſhalte graunt libertie to thy ſeruaunt, or releaſe the ſaide debte of tenne pound, before thou know of the conditionall diſpoſition, this acte ſhal be accõpted for an accompliſhment of the condition, becauſe now thou canſt not do it againe[t].

p) Dec. et Sichard. in d. L. ſi quis hæredem. de Inſtit. et ſub. C.

q) Supr. ead. part. §. 7. in prin. per gloſſ. et DD. in d. L. ſi quis hæredem. et Graſſ. Theſaur. com. op. §. legatum. q. 52.

r) Supra ead. part. §. 7.

s) d. L. ſi quis hæredẽ. et p Sichar. ibid. n. 3.

t) Sichard. & alij in d. L. ſi quis hæredem. de Inſtit. & ſub. C.

When† the condition is a *mixte* condition, 7 then it is ſufficient that the ſame was once accompliſhed, though it doo not ſo continue[v]: for† example, the teſtator maketh his daughter 8 executrix, or giueth her an hundred pound if

v) d. L. ſquis hæredem.

ſhe

she marie; she marieth; afterwardes her husband dieth, or they are diuorced by occasion of his faulte: In this case she is to bee admitted to the executorship, or maie obtaine the legacie, as if the mariage had not beene dissolued, by death or diuorce[x]. But if † the faulte were the occasion of the diuorce, it is more doubtfull whether the condition shall be accompted for complete to her benefit[y]: In which case neuertheless, their opinion seemeth the truer & sounder, who holde that the lawe dooth exact no more at her hands by reason of this former condition, but that she marie, not that she shold commit no faulte whereby the mariage must be dissolued[z]: and therefore hauinge performed the condition by mariage, the diuorce dooth not repel her, the rather because she did not offend of purpose, to infringe the condition[a]. In deede if shee did marrie onelie to obtaine the executorship or legacie, not with purpose to continue a duetifull wife, & afterwards committe adulterie, wherby she is separated; the condition is not satisfied by that mariage, and consequently she can neither be executrix nor obtaine the legacie[b]. But how maie it bee knowen, whether she did marie with purpose onelie to obtaine the benefit of the dispositi-on, or with purpose to continue a duetifull wife? the shortnesse of time betwixt the mariage and the committing of the fault dooth declare, for if she marie on the one daie, and commit the crime on the next, this is a testimonie that she had no ta meaning to endure the yoke

x) DD. in d. L. si quis hæredem.

y) DD. in d. L. si quis hæred. quorum Bald. Sal. & Alex. in ea opinione sunt, vt conditio non sit completa: sed Ang. Iaſ. Dec. & moderni ferè omnes contrarium defendunt.

z) Hoc tutius esse refert Iason, verius esse refert Dec. in d. L. si quis hæredem. quia viz. Lex illa loquatur in dissimili.

a) Dec. in d. L. si quis hæredem. cuius opinio facilius admitti debet, quandoquidem apud nos pro crimine solum ipsum matrimonij aliàs debitè ritéque contracti, vinculum non dissoluatur; sed separatio tantum sit à mensa & à thoro.

b) Dec. Sichard. & alij in d. L. si quis hæredem

of mariage [c]: furthermore if the mariage were not lawfull from the beginning, either by reason of the minoritie of the person, or by reaſō of conſanguinitie or affinitie, the condition is not reputed accompliſhed [d].

What † if the partie whom the teſtator maketh executor, or doth bequeath any legacy vnto conditionallie (*If ſhee ſhall marie*) be alreadie maried at the time of the will making, whether by this mariage is the condition ſaid to be complete? If the teſtator were ignoraunt of the mariage, the condition is ſaid to be accompliſhed, otherwiſe not; [e] as hereafter is more fullie declared. 10

What † ſhall we ſaie to this queſtion, the teſtator maketh A.B. his executor, or giueth him a hundred poūd if he marie his daughter. A.B. offereth to marie her, ſhe refuſeth: afterwardes ſhee beeing willing conſenteth, and then hee refuſeth: whether in this caſe ought A.B. to be admitted executor and maie recouer the legacie, as if he had maried her, yea or no? In deede if ſhe had neuer beene willinge or conſenting to be maried, it were a cleere caſe, that ſeeing it ſtoode not by him, wherfore the condition was not accompliſhed, but by her, then the condition ſhoulde haue beene reputed in lawe to haue beene accompliſhed [f], as hath beene heretofore declared [g]. But the caſe being altered, and ſhee which was vnwillinge before, being now at length become willing and conſenting, the queſtion is more doubtfull [h]: wherin verie † manie doo holde the affirmatiue, eſteeminge 11 12

c) Sichard. vbi ſupr. Arg. L. ventri §. hn. ff. de priuileg. cred.

d) L. pen quādo dies leg. ced. L. hæc conditio. de cond. & demon. ff. Mantic. de coniect. vlt. vol. lib. 11. tit. 18. n. 22.

e) L. ſi ita ſcriptum. §. ſi pater. ff de leg. 2. Mantic. de coniect. vlt. vol. lib. 11. tit. 18. n. 16.

f) c. cùm non ſtat. c. imputari. de reg. iur. 6.

g) Supr. ead part. §. 8.

h) vt per DD. in L. 1. de Inſtit. & ſub. C. & per Mantic. de coniect. vlt. vol. lib. 11. tit. 18. n. 38.

ſteeming that the cõdition being once accõpliſhed by her refuſall it is ſufficient, though it do not ſo endure, and that in this caſe, we are to reſpect the beginninge and not the ſucceſſe[i]. Others doo holde the negatiue, ſuppoſinge that the condition ought not to be accompted for accompliſhed, vnleſſe hee that is to reape the benefit by the performaunce thereof, doo continue and perſeuer in readineſſe and willingneſſe to performe the ſame, and that the laſte delaie is euer hurtfull[k].

i) Bald. Sal. Alex. Sichard. in d. L. 1. C. de Inſtit. & ſub. & Molin. in Apoſtil. ad Dec. in eand. L.

k) Petr. Cyn. Fulgoſ. & alij in d L. 1.

Either opinion hath manie authors of great authoritie, and albeit it maie ſeeme, that this condition being a mixte condition, not conſiſting in his owne power alone on whõ it is impoſed, but in hers alſo, that therefore beeinge once accompliſhed it is ſufficient, though it do not ſo continue: as in the former examples of being Proctor, Doctor, wife, or widow, where the conditions bee reputed for fullie performed, howſoeuer afterwardes the Proctor bee depoſed, the Doctor degraded, the wife diuorced, or the widdowe maried.

13 Yet notwithſtanding for mine † owne part, I doo rather cleaue to them which doo holde the negatiue opinion[l], and ſo that howſoeuer in this caſe, A.B. were at the firſt willinge and ready to haue accompliſhed the condition, and that it did not then ſtand by him wherefore the ſame was not performed, yet afterwardes ſhee conſenting and he diſſenting, it is in effecte, as if he had beene vnwillinge at the beginninge, and conſequentlie, that he is not to bee admit-

l) non tamẽ indiſtinctè vt infra hoc ipſo §. in fin.

ted executor, nor to recouer his hundred poūd by vertue of this diſpoſition.

To † the former obiection, that is ſufficient 14
that a mixte condition be once accompliſhed, though it doo not ſo endure: as appeareth by thoſe late recited examples. It maie bee anſwered, that there the condition was once actuallie complete, which was all that the teſtator ſeemed to require [m] in thoſe caſes: but here the condition was neuer in acte, and ſo the performaunce thereof came ſhorte of the teſtators deſire [n]. Wherefore as I ſaid before, I doo rather ſubſcribe to their opinion, who doo holde that in this caſe the condition is no more reputed for complete in lawe, then it is in fact: and conſequentlie that hee can reape no benefite thereby, by whom it ought to haue beene performed [o].

And this opinion I ſuppoſe to bee more agreeable to the meaninge of the teſtator, and therefore to be preferred [p], certaine caſes excepted. † One caſe is where the executor or le- 15
gatarie vpon the refuſall of hir offer, dooth marie an other woman, for then it is too late to repent, ſeeing from that time he hath iuſte cauſe to refuſe her offer after hee hath maried an other woman [q]. An other caſe is, when the teſtator remitteth a debt which is due vnto him: as for example, the teſtator remitteth to A.B. a hundred pound which he oweth him if hee marie his daughter: A.B. is willing and offereth to marie her; ſhe refuſeth, afterwardes ſhee is willing: this newe willingnes dooth not hinder

m) Ias. Dec. Sichard. & alij in d. L. 1. de Inſtit. & ſub. C.

n) Id quod clarè mihi conſtare videtur ex verbis teſtatoris dicentis (ſi duxerit filiam meam,) nec obijcias per eum non ſtetiſſe, ex quo nunc ſtat. Sin adhuc vrgeas conditionem, tunc primùm pro impleta haberi, quādo per eum non ſtetit. Reſpondeo illud plus habere ſubtilitatis quàm æquitatis, quippe qui non credam ſatisfactū eſſe voluntati teſtantis vnica nuptiarum oblatione, muliere poſtea conſentiente, ita vt non ſubſecutis nuptijs legatum iure poſci nō poſſit.

o) Fateor tamē contrariam opinionem dici communem, teſte Sichardo in d. L. 1. de Inſtit. & ſub. & quidem attenta iuris ſubtilitate, eandem opinionem magis ferendam eſſe non prorſus nego, ſed inſpecta teſtatoris voluntate, non ita.

p) Mens autem teſtatoris quàm diligentiſſimè inueſtiganda, & tanquàm regina colenda eſt, vt ait Sichar. in Rub. de teſta. C.

q) Socin. in L. in teſtō. el. 2. ff. de cond. & demon. Mantic. de coniect. vlt. vol. lib. 11. tit. 18. n. 38.

der the legatarie, being before deliuered, and the action extinguiſhed by her refuſall[r]. An other caſe is like vnto this, when after the refuſall made by the woman, and before her repentaunce, hee whoſe offer was before refuſed is admitted to the executorſhip, and dooth obtaine his legacie, and is poſſeſſed thereof, for notwithſtandinge her repentaunce and newe willingneſſe, he maie retaine that whereof hee was poſſeſſed[s]. An other caſe ſeemeth to bee this, namelie, when ſome ſpeciall thinge is bequeathed: as for example, the teſtator doth bequeath vnto thee his white horſe, or a hundred pounde lyinge in his cheſte, if thou marie his daughter, for ſtraight waie by her refuſall thou haſt gotten a certaine right in the thing bequethed[t]. If there be anie other caſes wherein the affirmatiue hath place, they are more ſtraung, nor eaſilie like to happen, and therefore not ſo neceſſarie to be knowen.

r) Mantic. vbi ſupra.

s) Mantic. vbi ſupra. poſt Socin. in d. l. in teſto. el. 2. de cond. & demon. ff.

t) Socin. vbi ſupr. huc pertinent quæ ſuperiùs dicta ſunt. ead. part. §. 4. in fin. Brook Abridg. tit. deuiſe. n. 6. 30. Bald. Sal. & Alex. in L. 1. de Inſtit. & ſub. C.

Of diuers conditions vvhich maie ſeeme doubtfull, whether they be lawful or vnlawful, and firſt of thoſe conditions, wherby the libertie of makinge teſtamentes is hindred, how far the ſame are lawfull, or vnlawful.

1 *Certaine conditions whereof it maie be doubted of ſome, whether they be lawfull or vnlawfull.*
2 *Captious conditions deſtroy the teſtament.*

3 *Captious conditions wherefore they bee ſo tearmed.*

4 *Teſtamentes are to be made with all freedome, not onelie without ſcare of loſſe, but alſo without hope of gaine.*

5 *This propoſition that captious diſpoſitions are void, diuerſlie extended.*

6 *The ſame propoſition diuerſlie limited.*

7 *An other kinde of condition againſt the libertie of making a teſtament.*

8 *The teſtament improperly tearmed captious, which is referred to the will of an other.*

9 *The teſtators will may not depend of an other mans will, and what is the reaſon thereof.*

10 *What if he to whoſe will the teſtator did referre his owne will, ſhould make a will in the name of the teſtator.*

11 *As an other mans ſoule is not my ſoule, ſo his will and teſtament is not my will and teſtament.*

12 *It is lawfull for the teſtator to referre his will to the will of an other being ioyned with a fact.*

13 *So is it when the teſtator dooth referre his will to the limited will of an other.*

14 *When is the teſtator ſaid to referre his owne will to an others abſolute will, and when to his limited will.*

15 *The declaration of the teſtators will maie be referred to an other.*

16 *What if relation be made to the will of the executor or ægatarie.*

17 *In fauour of libertie the diſpoſition maie be referred to an others will.*

18 *So maie the diſpoſition which is made* ad pias cauſas.

cauſas.

19 *He that dooth commit all his goodes to the diſpoſition of an other, doth not die inteſtate.*

§. xj.

1 FOr as much † as there bee diuers conditions which be neither ſimplie lawfull, nor ſimplie vnlawfull, but in diuers reſpectes lawfull and vnlawfull, eſpeciallie thoſe conditions whereby the libertie of *makinge a teſtamcnt* [a], or the libertie of *mariage* [b], or the libertie of *alienating the thing diſpoſed* [c], maie ſeeme to be hindred or reſtrained: I thought it conuenient in this place to ſhewe howe farre, and in what caſes theſe conditions be lawful or vnlawfull, and what effect they haue.

a) de qua conditione ſtatim ſubijcitur hoc ipſo §.
b) De qua infr. §. prox.
c) De qua infr. eod. part. §. 13.

2 And firſt of all † concerning thoſe conditions which do impugne and hinder that libertie, which ought to bee had in makinge of teſtamentes, and whereby the diſpoſition of the teſtator is ſaid to be captious, or to depende of the will of ſome other perſon: ſuch conditions are vnlawfull, and doo deſtroie the force of the diſpoſition [d]; and † therefore if the teſta-
3 tor make thee his executor vpon condition, if thou ſhalt make him thy executor, or giue thee a hundred poũd by his teſtamẽt cõditionally, if thou ſhalt giue him a hundred pound in thy teſtament: this kinde of diſpoſition is ſaide to be captious [e], becauſe hereby the teſtator goeth about to catche or intrappe thee to make him thy

d) L. Captatorias. de hæred. inſtituend. L. captatoriæ. de leg. 1. ff. L captatorias. de mil. teſtõ. C Couar. in c. cùm tibi de teſta. ext.
e) Illa enim voluntas propriè dicitur captatoria, quæ fit ſub ſpe reciprocæ voluntatis. Couar. in c. cùm tibi. de teſta. ext. Sichard. in L captatorias. de mil. teſtõ. C.

thy executor, or to giue him a hundred poūd, in caſe thou die firſt[f], and to hinder that libertie which thou ſhouldeſt enioie in makinge of thy teſtament. For when thou haſt made him thy executor and dieſt, then hath he that which he looked for, he is now thy executor, and thou on the contrarie, arte fruſtrated of that which thou perhappes diddeſt looke for, for beeinge dead thou canſt not be his executor[g]: and therfore † as in mariages the ſame ought to be free, 4
not onelie from feare of ſuffering loſſe, but alſo from feare of not obtaining gaine[h]: ſo in teſtamentes, the ſame ought to be made withall freedome, not onelie without feare of puniſhment of loſſe, but alſo without hope of gaine or reward[i].

And in this conſideration, † theſe captious 5
willes, whereby manie vnder pretence of making others their executors, or gratifiing them with legacies doo ſubtillie procure themſelues to be made executors, or otherwiſe to be benefited by the diſpoſitions of others, are ſo odious, that they are vtterlie voide[k], albeit they be militarie teſtamentes[l], or of the father amongeſt his children[m], or of a ſtraunger[n], or teſtamentes *ad pias cauſas*[o], or teſtaments made in time of warres[p], or teſtamentes made in the time of peſtilence[q], or teſtaments made in the perſon of a tirant[r], or in place wherein is wante of witneſſes[s], or before the prince[t], or whether it be teſtament or codicill[v], for in all theſe caſes and diuers others ſuch captious wils be voide[x].

Not-

f) Alciat. Perergon. lib. 2. c. 31. Auguſt. lib. 4. Emendac. c. 15.
g) Vide Minſing. lib. 1. obſeru. c. 8.
h) c. Gemmæ. de ſponſ. extra.
i) Sichard. in L. captatorias. C. de mil. teſto. n. 6.
k) L. illa. L. captatorias. de hæred. inſtituen. L. captatorias. de leg. 1. ff.
l) L. captatorias. de mil. teſtō. C.
m) Vaſq. de ſucceſſ. crea. lib. 2. §. 17. n. 28.
n) Vaſq. ibidem.
o) Nam quod dicitur captatoriam diſpoſitionem valere quoad piā cauſam, (vt in c. cū tibi de teſta. extr.) Id verum eſt in captatoria diſpoſitione impropriè ſic dicta, quæ viz. pendet ex alieno arbitrio, vt put in d. c. cùm tibi. & Couar. ibid. n. 2. & ſtatim ſubijcitur, non autem quādo diſpoſitio fit ſub ſpe remunerationis. Sarmiētus. lib. 2. ſelect. op. c. 4. n. 8. c. 6. n. 33. Sichar. in d. L. captatorias.
p) Vaſq. de ſucceſſ. crea. lib. 2. §. 17. n. 83.
q) Vaſq. vbi ſupr.
r) Ibidem.
s) Ibidem.
t) Ibidem.
v) Ibidem.
x) Ibidem.

6 Notwithstanding † if the condition bee not referred to the time to come, but to the time paste, or present, the condition is not vnlawfull nor the disposition voide: and therefore if the testator make thee executor of his testament, if thou hast named him executor in thy testament, or giueth thee an hundred pounde in his will, if thou hast giuen him a hundred pounde in thy will, this condition is not vnlawfull[y], for two persons maie make either other executors, or otherwise benefit one an other by their testaments, so it bee doon in regard of good will, and affection, and not in hope of gaine or remuneration[z].

y) Sichard. in L. captatorias. de mil. testō. C.

z) Alciat. Perergon. lib. 3. c. 31. Couar. in d. c. cùm tibi de testa. ext. n. 1.

Besides this former kinde of disposition which by reason of the cunning condition appeareth to be made in hope of gaine, and is
7 therefore properlie tearmed captious: there † be other like dispositions which be repugnant to the libertie of making testaments, which also are said to be captious: that is to saie, when the testators will dooth depend of the will of an other[a]: as for example, the testator maketh thee his executor or giueth thee a hundred pound if A. B. will, or thus. The testator maketh that person his executor, or giueth him a hundred pound whom thou wilt appoint[b]: In both
8 these cases † the disposition is said to bee captious[c], though not so fitlie as commonlie[d]. Neuertheleſſe the condition is vnlawful, becaus it is against the libertie of making testamentes,
9 wherein † the testators will ought not to depēd on the wil of another[e]: For the ancient lawmakers

a) Couar. in d. c. cùm tibi. de testa. ext.

b) Canonistæ. in d. c. cùm tibi. de testa. ext. Legistæ. in d. L. captatorias. de mil. testō. C.

c) DD. in d. L. captatorias. & in d. c. cū tibi. Grass. Thesaur. com. op. §. Institut. q. 18.

d) Alciat. Perergon. c. 31. Couar. in d. c. cùm tibi. Soarez. lib. rec. senten. verb. captatorias. An autem valeat huiusmodi dispositio, quære vt infr. d. §.

e) L. illa institutio. ff. de hæred. instituend.

kers considering, that if it should be lawfull for testators to referre their willes to the willes of others, and to depend vpon them, then hee on whom the testator did depend, either not dooing anie thing at all, or else dooing otherwise then the testator woulde, by that meanes the testator shoulde remaine deceiued, & they to whome the testator did wish well, should be disappointed. [f] For the auoyding of which inconueniences they did ordaine, that euery testament should personally depend of the testators owne will, and not of the will of another, by whom the testator might be deceiued. [g] And† thence it is that a testament is defined to bee a sentence of our will, not of another mans will [h]. Therefore when thou art made executor, or some legacie is bequeathed vnto thee (if A.B. will) as is set downe in the former instance, although A.B. should wil that thou shouldest be executor, or haue the legacie: notwithstanding thou couldest neither bee executor [i], nor obteine the legacie [k]. And euen so where the testator maketh that person his executor, or giueth him an hundred pound, whom thou wilt appoint (as in the seconde instaunce) though thou shouldest appoint one, yet this appointment should not benefit him [l]: For† as thy soule is not the soule of the testator, no more is thy will his will, nor thy testament his testament [m], neither is it in the power of the testator to referre the substance of his will to the will of an other, [n] being such a qualitie as cleaueth to his owne person, and cannot bee committed to another

10

11

f) Sichard. in L. captatorias. C. de mil. testo. n. 4.

g) Sichard. vbi supra. Peckius. in Tract. de testa. coniug. lib. 1. c. 27.

h) Supr. 1. part. §. 2. & 3.

i) L. illa institutio. ff. de hær. instit. Paris. cons. 38. lib. 3. n. 60. 73.

k) L. nonnunquam. de cond. & demon. L. captatoriæ. de leg. 1. ff. & est communis opinio, quam etiam defendit Couar. in d. c. cùm tibi. de testa. extr.

l) Bar. in L. quidam. de Reb. dub. ff. n. 7. 8. Bald. in L. executorem, C. de execu. rei iud. n. 5. Paris. cons. 38. vol. 3. n. 6. Grass. §. Institutio. q. 18. n. 4.

m) Bald. & Angel. in L. captatorias. C. de mil. test. Vasq. de succes. creat. lib. 2. §. 17. n. 81. Peckius. Tract. de testa. coniug. c. 27. n. 3. Paris. d. consil. 38.

n) d. L. illa institutio. ff. de hær. red. instit. Bar. in L. quidam de reb. dub. ff. Peckius. Tract. de testa. coniug. lib. 1. c. 27. n. 3.

another[o], except in certaine caſes.

o)Sarmientus.lib.2. ſelect.interp.c.6.n.2.

12 The firſt is when † the teſtator doth not referre his diſpoſition to the ſole onelye will of another perſon, as in the former example, viz. if A.B. will; but to the concreate will, or will ioyned with fact[p]: as for example, the teſtator maketh thee his executor, or giueth thee an hundred pounde, if his ſonne ſhall goe to the Church, this is a lawfull condition, and therefore the condition being complete, thou art to be admitted executor, or maiest obteine the legacie[q]: And yet there ſeemeth but a little difference betwixt theſe conditions (if A. B. will) or (if A.B. ſhall goe to the Church) for that it is in his will, whether he will go to the Church or not. But many things doe greatly hurt being expreſſede, which not expreſſede doe no harme[r].

p)L.nonnunquam.ff. de cond.& demon.

q)d.L.nonnunquam. Sarmient. lib. 2. ſelect. interp.c.6.n.28.

r)d.L.nonnunquam.

13 An other caſe is this, when † the teſtator doth not referre his will to the meere abſolute will of another (as if A. B. will) but to his limited will[s]. As for example, the teſtator doth make thee executor, or giueth thee a hundred poũd (if A.B. *ſhall eſteeme it conuenient.*) In which caſe, if A.B. ſhall eſteeme it meete or conuenient that thou bee executor or haue the legacie of an hundred pound, then thou art to be admitted to the one[t], or maiſt obteine the other[v].

s)Sichard.in d.L.captatorias.C.de mil.teſto

14 The † teſtator is ſaide to referre his diſpoſition, to *the meere abſolute will* of another, when he committeth the ſame to his will, to his luſt, to his appetite[x]: *to his limited will*, when he referreth the ſame to his diſcretion, iudgement,

t)Sichard.vbi ſupr. quamuis quoad hæredis inſtitutionẽ iſtud non procedit ſine difficultate maiori iure ciuili. Sarmient.lib.2. ſelect.interp.c.6.n.4.

v)L.ſi ſic.de leg.1.L.1. de leg.2.L.fideicõmiſſa de leg.3.ff.

x)Menoch.de Arb.Iud. ſentent.lib.1.q.7.

ment, wiſedome, good pleaſure, diſpoſition, and conſcience[y].

y) Iaſ. in L. ſi ſic. de leg. 1. ff. Menoch. d. lib. 1. q. 8

Thirdly, when † the ſubſtance of the teſta- 15
tors will is not referred, but only a declaration or election[z]: as for example, the teſtator maketh one of his ſeruants his executor, or giueth him an hundred pounde, whome thou ſhalt chooſe. In this caſe he whom thou ſhalt chooſe of the teſtators ſeruants ſhall be executor, or recouer the legacie.[a] Another † caſe is when 16
the diſpoſition is referred to the will of the executor touching the executorſhip, or of the legatarie, touching the legacie: as for example, the teſtator maketh thee his executor, if thou wilt, or doth giue thee a hũdred pound, if thou wilt, for this condition is not onely permitted, but is neceſſarily required[b].

z) L. vtrum. §. cùm quidam. ff. de reb. dub. Bar. in L. quidam. eod. tit. n. 8. Peckius. de teſta. coniug. lib. 1. c. 27.

a) L. fideicommiſſ. de fideicom. lib. in fin. ff. Pariſ. conſ. 38. lib. 3. Graſſ. §. Inſtitutio. q. 18. n. 6. vbi ait hanc opinionem eſſe com.

b) Supr. eod. part. §. 6.

Another caſe † is in fauour of libertie or free- 17
dome from bondage, and therefore if the teſtator doe manumit his villeine, if his executor will, it is as effectuall, as if he had referred the ſame to the diſcretion, or wiſedome, or conſcience of his executor[c].

c) L. fideicommiſſa. de fideicommiſſ. lib. ff. Sichard. in L. captatorias. C. de mil. teſtõ. d) Paul. de Caſtr. & Alex. in d. L. captatorias. Abb. conſ. 32. lib. 2. Boic. & Couar. in d. c. cùm tibi. Bald. in c. in cauſis de elect. extr. quorum opinio eſt com. Graſſ. §. Inſtitutio. q. 18.

And further, † when the diſpoſition is made 18
ad pias cauſas, then it is alſo lawfull for the teſtator to commit the verie ſubſtance of his will, to the free and abſolute wil of another,[d] and therfore if the teſtator make the poore of the pariſh his executor, or giue them an hũdred pound, if A.B. will, this is a good diſpoſition[e].

e) Et hoc procedit iure Can. non ſolùm quoad legata, ſed etiã quoad inſtitutionem. Couar. in d. c. cùm tibi. n. 12. referens hanc op. eſſe veriorem. Tu adde Gabr. lib. 6. com. concluſ. Tit. pia cauſa. concl. 3. vbi pulcherrimè hanc concluſionem ornat varijs ampl. & limitac.

Finally † if the teſtator commit the diſpoſi- 19
tion of all his goods to another, this is lawful, and he to whom the diſpoſition is committed,

is

is vnderstoode to bee made executor, to distribute all the said goodes *in pios vsus*[f]: so it is, if the testator commit his soule and all his goods to the hands of another, as hath beene heretofore delcared[g].

f) c. cùm tibi. de testa. extr. & ibi Couar. n. 10. Grassd. §. Institutio. q. 18. Peckius. de testa. coniug. lib. 1. c. 27. quorum testimonio hæc opinio est communis.

g) Supr. eadem part. §. 4.

Of those conditions vvhereby the libertie of mariage is restrained, viz. howe far the same be lawfull or vnlawfull.

1 *Of conditions against the libertie of mariage, some are lawfull, some vnlawfull.*

2 *Conditions against the libertie of mariage, are all vnlawfull, except in certaine cases.*

3 *The reasons wherefore the conditions against the libertie of mariage, are vnlawfull.*

4 *The prohibition of the first mariage more odious then of the second.*

5 *The condition of mariyng with the arbitrament, will, or consent of another is vnlawfull.*

6 *The reason wherefore the former condition is vnlawfull.*

7 *The condition prohibiting mariage for a short time is not vnlawfull.*

8 *The condition prohibiting mariage with some persons, is not vnlawfull.*

9 *Whether the condition prohibiting mariage haue respect onely to the first mariage.*

10 *An occasion of doubt, whether the former conclusion be true.*

11 *An answer to the same doubt, distinguishing whether the conditions be affirmatiue, or negatiue.*

12 *The condition prohibiting mariage in some place, is not vnlawfull.*

13 *The condition hauing relation to the mariage of a third person, is not lawfull, sauing where that third person is of kinne.*

14 *The condition prohibiting mariage, is not reiected where* pia causa *is substituted.*

15 *Affirmatiue conditions about mariage are not reiected but in some cases.*

16 *Some affirmatiue conditions of marying, harder then the negatiue of not marying.*

17 *The condition of marying with the aduise or counsell of another, is not vnlawfull.*

18 *The condition of marying with the consent of an other, is to be obserued in part.*

19 *Difference betwixt those phrases,* If he doo not marrie, *and,* so long as he doth not marrie.

20 *The condition of not marying doth not hinder restitution simplie imposed.*

§. xij.

ALbeit † all those conditions whereby the libertie of marying is wholy taken away, are generally disliked[a]: neuertheless, where the conditions be such whereby mariage is not altogether prohibited, but in parte restrained, as in respect of time, place, or person, they are not to be vtterly reiected[b]. 1

Wherefore, that wee may the better knowe when these kinde of conditions be admitted or not, I thought it best, and the moste easie way to

a) L. quoties. de cond. & demon. L. seruo. §. si testator. Ad. Trebell. ff.

b) L. cùm ita. L. hoc modo. L. sed si. §. cùm vir. de cond. & demon. ff. & infr. hoc §.

to ſet downe a rule, with ampliations and limitations of the ſame, according to the diuerſitie of caſes, incident to that purpoſe.

2 The † rule ſhall bee this, that *all conditions agaynſt the libertie of marriage are vnlawfull* [c]; and that whenſoeuer the teſtator dooth appoint his executor, or make any bequeſt vpon ſuch condition, that then the condition is voyde, as if it were not written; and that hee who is made executor, or to whom any legacie is giuen vpon ſuch condition, may bee admitted to the executorſhip, or may obtaine the legacie, as if the diſpoſition had beene ſimple [d].

3 The † reaſon which the lawyers do yeeld, (I meane) of the vnlawfulneſſe of this condition, is, becauſe it is contrarie to the procreation of children, and repugnant to the lawe of nature, and hurtfull to the common wealth [e]: whereunto it may bee added, that howſoeuer virginitie is commended, yet mariage is not thereby condemned, and therefore (as I ſayde before) if the teſtator make one his executor, or giue him an hundred pounde, if he doe not marrie, this condition is vnlawfull, and as if
4 it were not written [f]: which †thing is rather true, if the executor or legatarie were neuer married before, for the prohibition of the firſt mariage is much more odious in law then the ſecond [g]: for albeit it be commonly and truely ſayde, that the common wealth hath an intereſt that teſtaments ſhoulde bee executed [h], yet the common wealth hath a greater intereſt,

c) Eand. reg. tradit Vigelius in ſua methodo exactiſſima iuris ciuilis. part. 4. lib. 14. c. 3. cũ decem exceptionibus. Et licèt idem Vigelius poſtea exiſtimet contrarium iure nouo cõſtitui, & ita ſuperuacaneas eſſe illius regulæ exceptiones, pace tamen tanti viri, nihil noui ſtatuitur in primis nuptijs, in quibus vel hodie ius antiquum obtinet, vt verè atteſtatur Mantica de coniect. vlt. vol. lib. 11. tit. 19. in prin. Cui concinnit Graſſ. Theſaur. cõop. aſſerens conditionẽ qua in totum prohibetur matrimonium in virgine turpem, contra bonos mores, atq; adeò de iure impoſſibilem eſſe, denique communi Doctorum calculo reiectam. §. legatum. q. 50.

d) L. quoties. L. ſed ſi. §. fin. L. cum tale. §. Meuiæ. de cond. & demõ. ff. L. 2. C. de indict. vid.

e) Mantic. de coniect. vl. vo. li. 11. tit. 19. in prin.

f) L. quoties. L. hoc modo. L. cùm ita legatum. de cond. & demon. ff.

g) Iſtiuſmodi ſiquidem conditio, ſi permanſerit vidua, vel caſtè vixerit, in ijs nõ reijcitur, in alijs ſecus. Auth. cui relictum. C. de indict. vid. Couar. Epitõ. de ſponſal. c. 2. §. 9. n. 11. Graſſ. Theſau. com. op. §. legatum. q. 50. quãuis eam non modo durã, ſed & iniquam exiſtimauit Peckius. Tract. de teſtam. coniug. lib. 1. c. 24.

(h) L. Gallus. §. quid ſi is. de lib. & poſthu. L. vel negare. quemad. teſta. app. ff.

that it ſhould bee throughly peopled, and therfore mariage not to be prohibited[i].

And in conſideration hereof, this rule is extended, that if † the teſtator make ſome perſon his executor, or giue him any legacie, if he marrie according to the appointment, arbitrement or conſent of ſome other; this condition is reiected as vnlawfull[k]. And therefore in this caſe if he that is made executor, or to whome anie legacie in ſuch ſort is giuen, doo marrie contrarie to the ſayde reſtraint, mentioned in the teſtament, he is to bee admitted to the executorſhip, and may obtaine the legacie, as if no ſuch condition had bene expreſſed[l]. 5

The † reaſon of the vnlawfulneſſe of this condition is, leaſt hee whoſe arbitrement were to bee followed, or whoſe good will were to bee procured, might make an hard choiſe for the executor or legatarie, either by reaſon of the diſlike of the parties[m], inequality of age, diſparitie of kinred, diſagreeing in maners or ſuch like, which, if it were ſuffered, woulde breed greater miſchiefe, then may be in a caſe of that qualitie tolerated or indured. 6

Moreouer, if the teſtator doo bequeath any legacie to a woman condicionally, if ſhee doo not marrie, willing her to reſtore the ſame toſome other, if ſhe doo marrie: Albeit in this caſe the woman doo marrie, ſhee may obteyne the legacie, neither is ſhe bound to reſtore the ſame[n], vnleſſe it were the meaning of the teſtator not to forbid marriage, but to graunt the vſe of the thing bequeathed vntill the legatarie

i) L. 1. ſol. matr. L. cùm ratio. §. ſi plures. de bō. dam. ff. Mantic. de coniect. vlt. vol. lib. 11. tit. 19. in prin.

k) L. cùm tale. §. ſi arbitratu. d. §. ſi Maeuiæ. Grauetta. conſil. 1. n. 3. Mantic. de coniect. vlt. vol. lib. 11. tit. 18. n. 8.

l) d. §. ſi arbitratu. L. turpia. §. ſi Titiæ. de leg. 1. ff. Grauetta. & Mantic. vbi ſupr. Peckius de teſta. coniug. lib. 1. c. 24. n. 6. vbi dicit hoc procedere in virginibus, non in viduis, ob nouellam Iuſtiniani conſtitutionem, qua pmittitur conditio viduitatis: quod etiam alijs placet. vt Graſſ. d. §. legatum q. 50. n. 10.

m) Quam rationem communiter eſſe receptam refert Graſſ. Theſaur. com. op. §. legatum. q. 50. n. 9. poſt DD. in d. L. turpia. §. ſi Titiæ.

n) L. quoties. de cond. & demon. ff. Mantic. de coniect. vlt. vol. lib. 11. tit. 19. n. 4. Graſſ. Theſaur com. op. §. legatū. q. 50. n. 7. 8.

rie did marrie[o]. Other extenſions there bee alſo of this rule, but let vs returne to the limitations.

o)Peckius de teſta. coniug.lib.1.c.24.L.ſed ſi §.cum vir.de cond.& demon.ff.

7 The firſt limitation therefore is, when † the condition is not perpetuall, but temporall[p], as if the teſtator make his daughter executrix, or bequeath her a hundred pound, if ſhee doo not marie before the age of 20. yeares: this condition is to be performed[q]: Howbeit if the time of the prohibition be ſuch, that it is verie like, if ſhe ſhould cõtinue a maide during that ſpace, that her mariage ſhould bee greatly hindered, the condition is reiected, as being made in fraude of mariage[r].

p)L.ſed ſi.§. cùm vir.ff. de cond.& demon.

q)Iaſ.in Auth.cui relictum.de indict.vid.C. Mantic.de coniect.vlt. vol lib.11.tit.18.n.8.

r)Iaſ.in d.Auth.cui.n.3 per L.cùm tale.ff.de cond.& demon.Fran. de Are.conſil.67.Mantic.de coniect.vlt.vol. lib.11.tit.19.n.8.

8 The ſecond limitation is when † the prohibition doth onely exclude ſome perſons: as for example, the teſtator dooth make thee his executor, or giueth thee an hundred pounde, if thou do not marrie a widdow; this condition is not vnlawfull[s]: And therefore if at any time after thou doo marrie a widdowe, thou canſt not be executor, nor obtaine thy legacie: In ſo much that † if thou ſhouldeſt mary a mayde, & after her death ſhouldeſt marrie a widdowe, all thy hope of beeing executor, or obteining thy legacie is extinguiſhed, by this thy ſeconde mariage[t], much more is the condition lawfull, if the teſtator make thee his executor, or giue thee any legacie, if thou doo not marie this, or that particular woman[u], for here thou haſt greater libertie, and more choiſe, then in the former. Where † I ſaid that the hope & intereſt of the executor or legatarie is extinguiſhed, if at

s)L.cùm ita legatum. ff.de cond.& demon. Peckius de teſta coniug.lib.1.c.24.n.4.

t)Oldrad.conſil.16. Alciat.in L.boues. § hoc ſermone.de verb.ſig. ff.& Tiraquel.in d.§. limitac.7.

v)d.L.cum ita legatũ. Mantic de coniect.vlt. vol.lib.11.tit.19.n.9. Peckiꝰ de teſtam. coniug.lib.1.c.24.

any time he mary contrarie to the prohibition of the testator, whether it bee the first or the second mariage, this may seeme doubtfull: for that when mention is made of mariage, it is to be vnderstood of the first mariage onely [x]. And therefore if the testator make thee his executor, or giueth thee an hundred pounde if thou marie his daughter; if thou after the making of this will, shouldest firste marie some other woman, and after her death shouldest marrie the testators daughter [y]: yet couldest thou not bee executor, nor obteine the legacie: for in this case, the testator is presumed to meane of the first mariage, not of the second mariage [z]. How then commeth it to passe, that thou beeing made executor, or hauing any thing bequeathed vnto thee, if thou doo not marrie the testators daughter, losest all thy hope and interest, whensoeuer thou doost marrie her, supposing thou haddest married one, two or three before. The † answere is this, when the condition is affirmatiue, then it is to bee vnderstoode of the first act onely: but when the condition is negatiue, then not onely the firste act, but the seconde, thirde, and euery other act is perpetually forbidden [a], the reason of the difference is, because there is greater force in the negatiue then in the affirmatiue [b]. 11

The thirde limitation is, † when the condition is limited, onely in respect of some place, as if thou doost not marrie in the Citie of Yorke [c]. 12

The fourth limitation is, when † the condition 13

x) d.L.boues.§.hoc sermone.

y) Paul.de Castr.in L. hoc genus. ff. de cond. & demon.

z) Tiraquel.in d.§. hoc sermone. n.3.4. facit L. matrimonij.ff.qui & à quibus.ma.

a) Oldrad.d.consil.16. Alciat.& Tiraquel in d.§. hoc sermone. Bar. & Paul.de Castr.in d. L.hoc genus.ff.de cond.& demon.

b) Pl⁹ negat negatio q̃ affirmat affirmatio, inquit Paul.de Castr.in d L.hoc.genus.

c) L.hoc modo.ff.de cond. & demon. Graff. Thesaur.com.op.§.legatũ.q.50. Peckius.de testa.coniug.lib.1.c. 24.n.19.

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tion of not marrying, is not referred to the executor or legatarie, but to ſome other perſon: as for example, the teſtator maketh thee his executor, or giueth thee an hundred pound, if his daughter doo not marrie: in this caſe the condition is not reiected, wherefore thou art to expect the euent thereof[d], for if ſhee marrie thou art excluded, if ſhee die vnmarried thou art to bee admitted[e]. But if the teſtator make thee his executor, or giue thee an hundred pounde, if thy daughter doo not marrie: this condition is vnlawfull[f], for where the perſon whoſe mariage is prohibited, is of thy neer kinred which art made executor or legatarie, it is likely that ſuch perſon will by thy perſwaſions abſtaine from marriage, to inrich thee by the teſtament[g], and therefore the lawe to preuent ſuch fraude, hath reiected that condition[h].

d) L.1.C.de indict.vid. Mantic.de coniect. vlt.vol.lib.11,tit.19.n 5.

e) DD.in d.L.1.C.de indict.vid.

f) L.hæres meus. §.vlt. de cond.& demon.ff.

g) d.§.vlt.& ib. Bar.& Paul.de Caſtr.

h) Mantic.de coniect. vlt.vol.lib. 11. tit.19. vbi tradit alias limitationes.

14 The fift limitation is, when † that which is giuen with condition of not marying, is to bee diſtributed *in pios vſus*, in caſe the condition be not obſerued: as for example, the teſtator doth bequeath vnto thee an hundred pound, if thou doo not marrie; and if thou dooſt marrie, then he dooth will that the ſame bee diſtributed amongſt the poore ſchollers of Oxford. In this caſe the condition is not reiected as vnlawfull, and ſo if thou ſhalt marrie, thou loſeſt thy hundred pound, and the ſame is to bee diſtributed amongſt the ſaide poore ſchollers[i], the reaſon is, for that the law doth more fauour pietie thē the libertie to marrie[k].

i) Paul.de Caſtr.in l. Titio.§. vlt. de cond. & demon.ff. Mantic de coniect vlt.vol.lib.11. tit.18.n.9.

k) Mantic vbi ſupr I-mol.in d. L. Titio. §.vl. Tiraquel.de priuileg. pix cauſæ.priu.18.

15 The ſixt limitation is, when† the condition

is conceiued affirmatiuely, not negatiuely: for example, the teſtator maketh thee his executor, or giueth thee an hundred pounde if thou marrie his daughter[l], or if thou marrie a maid[m], or if thou marrie within a moneth[n], or if thou marrie at London[o], for albeit in theſe affirmatiue conditions, is alſo included a negatiue, that is to ſay; if thou doo not marrie another woman, nor at anie other time, nor in any other place: neuertheleſſe, theſe conditions are not vnlawfull, ſeeing the included negatiue is not vniuerſall but particular[p].

But if † the woman appointed by the teſtator be ſuch as thou canſt not with honeſtie marie her[q], then howſoeuer the condition bee affirmatiue, yet in verie truth it is a harder condition, and more againſt the libertie of mariage, then this negatiue (*if thou doo not marrie*;) for by this affirmatiue, thou art not onely excluded from marrying any other, but thou art, as farre as is in his power, inforced to accept her, whom thou canſt not with thy credite marrie[r]. And the like may bee ſaide, if the time or place be not conuenient, for then alſo the condition is reiected[s]. 16

The ſeuenth limitation is, when † by the condition the executor or legatarie is not to marrie without the counſell or aduiſe of another perſon[t]: as for example, the teſtator dooth make thee his executor, or giue thee an hundred pound, if thou doo marrie with the counſell or aduiſe of his brother; for if thou do marrie without his counſell or aduiſe, thou art excluded: 17

l) L. vter. de cond. & demon. ff. Mantic. de coniect. vlt. vol. lib. 11. tit. 18. n. 2.

m) Peckius. Tract. de teſta. coniug. lib. 1. c. 24.

n) Mantic. d. tit. 18.

o) Peckius. d. c. 24. n. 5. in fin.

p) L. cùm ita. L. hoc modo. ff. de cond. & demon.

q) d. L. cùm ita legatũ.

r) d L. cùm ita in fin. Mantic. de coniect. vlt. vol. lib. 11. tit. 18. n. 5 & Bar. in d. L. cùm ita, vbi reſpondit, quæ perſona ſit indigna tuis nuptijs, nempè illa, cui non potes ſine dedecore nubere, inſpecta natalium qualitate: Ne dũ ſi iure vel ciuitatis moribus prohibeantur huiuſmodi nuptiæ, indigna erit perſona, & inutilis conditio.

s) Mantic. & Peckius. vbi ſupra.

t) Caſtrenſ. & Alex. in L. Turpia. §. ſi Titiæ. de leg. 1. ff. Bar. in L. 1. §. ſi plures. de exercit. action. ff. Mantic. de coniect. vlt. vol. lib. 11. tit. 18. n. 10.

cluded[v]: Neuertheleſſe, in this caſe thou art not bound to follow his counſell or aduiſe, but to requeſt the ſame[x].

v) Mãtic. vbi ſupr. Ayn. Grauet. cõſil. 1. Couar. de ſponſal. 2. part. c. 3. §. 8. n 3.

x) Paul. de Caſtr. conſil. 300. vol. 1. Felin. in c. ex part. de conſtit. extr. col. 2. Graſſ. Theſaur. com. op. §. legatũ. q. 50. n. 11. licèt impreſſio in illo loco ſit corrupta.

18 The eight limitation is this, where † it is ſaid before, that the condition of marying with the conſent, good will, and arbitrament of an other is voide, (ſo that the executor or legatarie, to whom the condition is impoſed, is neither bound to obteine, nor yet to craue the cõſent, good will, or arbitrament of that other) yet the perſon on whom the condition is impoſed, cannot be executor, nor get the legacie, vnleſſe he doo marrie[y], for though he need not ſo much as to craue the conſent, or good will of any third perſon in this caſe, ſeeing that part of the condition is vnlawfull; yet muſt he marie ere he can pretende anie title to the executorſhip or legacie, ſeeing that part of the condition is not vnlawfull[z].

y) Alex. & Paul. Caſtrenſ in d. L. turpia. §. 1. ff. de leg. 1.

z) Mantic. de coniect. vlt. vol. lib. 11. tit. 18. n. 8. poſt Alex. & Caſtrenſ. in d §. 1.

19 The ninth limitation is, when † the prohibition of mariage is not made conditionallie by this worde *If*, (*as I make thee my executor if thou dooſt not marrie*) but by other wordes or aduerbes of time, as when the teſtator willeth, that his daughter or wife ſhall bee executrix, or haue the vſe of his goods, *ſo long* as ſhe ſhall remaine vnmaried[a].

a) L. legatum ita eſt. de an. leg. ff. Peckius. de teſta. coniug. lib. 1. c. 24.

20 The tenth limitation is, when † the perſon on whom the condition is impoſed, is ſimplie charged to reſtore the thing bequeathed[b]: As for example, the teſtator doth bequeath to thee an hundred pound, if thou doo not marry, and hee dooth will thee to reſtore the ſame to his

b) L. non dubium. ff. de leg. 3.

ſonne when he ſhall come to lawfull yeares: In which caſe thou art by lawe to reſtore the ſame accordingly[c], neither is this limitation contrarie to the former ampliation of the rule, for here thou art charged with reſtitution ſimplie, there conditionally[d].

c) d.l.non dubium. Mantic.de coniect.vlt. vol. lib.11.tit.19.n.4. Graſſ.Theſaur.com.op. §.legatum.q.50.
d) Mantic.d.tit.19.n.4.

Whether the condition forbidding alienation of goodes bequeathed, be lawfull or vnlawfull.

1 *Prohibition of alienation is ſometimes to be obſerued as lawfull, ſometimes not.*
2 *Prohibition apparelled with a cauſe is lawfull.*
3 *Naked prohibition dooth not binde the executor, or legatarie.*
4 *Whether the feoffee may be prohibited to alienate.*
5 *Whether the dower of landes in taile may prohibite alienation.*
6 *As it is lawfull to prohibite alienation in fauoure of ſome perſones, ſo in disfauoure of others.*
7 *Of thoſe cauſes wherewith the prohibition is ſaide to be apparelled.*
8 *In what caſes the executor or legatarie may alienate the thing deuiſed, notwithſtanding the apparelled prohibition.*
9 *Bond ought to be put in where there is a condition prohibiting alienation.*

§.xiij.

1 THe † prohibition of the teſtator, forbidding the executor or legatarie to alienate the goods bequeathed, is ſomtimes to bee obſerued as lawfull, ſometimes not.

2 The prohibition is then † lawfull and to be obſerued, when it is made in fauour of ſome other perſon, who is to enioy the thing diſpoſed, after the executor or legatarie, or when there is ſome ſpeciall [a] cauſe whereuppon this reſtraint is grounded.

a) L. filiusfamilias. §. diui. de leg. 1. ff.

3 The † condition is not of any force, when it is without cauſe, or not made in fauor of any other perſon, ſaue onely of the executor or legatarie [b]. In which caſe they may renounce this fauour, and alienate the thinge deuiſed, notwithſtāding ſuch ſingle prohibition, which is rather ſaid to be a counſell, then a commaundement [c]: For the lawe dooth deeme it an abſurde matter, that a man ſhould bee lorde and owner of a thing, and yet ſhoulde not at pleaſure alienate the ſame [d]. In which point alſo I

b) d. §. diui.

c) Iaſ. in d. §. diui. n. 1.

d) Iaſ. in d. §. diui. n. 9. Doct. & Stud. lib. 1. c. 24

4 ſuppoſe that † the temporall lawes of this realme haue the ſame effect in landes, which the lawes eccleſiaſticall & ciuill haue in goods. And therefore if a feofment be made of lands in fee ſimple, vpon the condition that the feoffee ſhall not alienate or put away the ſame: this condition is voide, becauſe the feoffee is without any cauſe wholye reſtrained of that power which

which the lawe yeeldeth vnto him in ſuch a caſe[e]

e)Brook Abridg.tit.cõdition.n.135. Fitzherb. tit condition.n 4. Principall grounds. fol.28. Doct.& Stud.lib.1.c.24. Litleton.tit.eſtates vpõ conditions.

But when the prohibition hath a cauſe annexed, or the ſame is made in fauour of ſome other perſon, who is afterwardes to enioy the landes; then this condition of not alienating the ſame, is good and effectuall in the lawe, as may appeare by the gifts of lande in taile. For. if † landes be giuen to a man, and to the heires 5
of his bodie lawfully begotten, vppon condition, that neither he nor his heires ſhall alienate the landes to any other perſon: this condition is good and effectuall. In which caſe, if hee or his heires to whome the land is giuen, alienate the ſame, then the giuer or his heires may lawfully enter and retain the lands for euer[f]. And † 6
as it is not lawfull to alienate from particular perſons, in whoſe fauour the prohibition is made: no more is it lawfull to alienate to thoſe particular perſons, in whoſe disfauour the prohibition is made[g]. In which caſe alſo concerning landes, the lawes of this realme, doo not differ from the ciuill and eccleſiaſticall lawes concerning goodes: for howſoeuer it is not lawfull for the feoffer to cutte off the whole power of the feoffee, yet hee may abridge or reſtraine ſome part therof, by condition that he ſhall not alienate his landes to ſuch or ſuch perſons[h].

f)Fitzherb. Abridg.tit. condition.n.4. Litletõ. tit.eſtates vpon conditions.fol.77.

g)Alex.in d.l.filiusfamilias.§.diui.ff.de leg.1.n.1.

h)Brook Abridg.tit. cond.n.135. Litleton. tit.eſtates vpon condition.fol.libri mei.77.

The † cauſe wherewith the prohibition is 7
ſaide to bee apparelled, beſides theſe former reſpects of the fauour and disfauour of perſons,

ariſeth

ariſeth for the moſt part of the teſtators affection, towards the thing bequeathed: as when the teſtator dooth bequeath ſome cuppe of golde which was his anceſtours, forbidding the executor or legatarie to alienate the ſame, but to keepe it for a memoriall[i]: or when he doth bequeath ſome iewell, or other ornament being the gift of the prince[k], and for that cauſe dooth prohibite the alienation thereof; or when hee dooth bequeath ſome prize by him gotten in the warres, as a ſworde or an helmet, and therefore dooth forbid the alienation thereof[l].

i) L. ſi in emptione. de Minor. ff. Paul. de Caſtrenſ. in d. §. diui.

k) Alex. & Ripa. in d. §. diui.

l) Alex. & Rip. vbi ſupr.

Which prohibition in this ſort is to bee obſerued, as well as if it were in regard of ſome other perſon[m], except it be in certaine caſes, for it is not perpetually true, that the prohibition vpon a cauſe, or made in reſpect of ſome perſon is to be obſerued.

m) d. L. filiusfa. §. diui.

The firſt exception therefore of this rule is, when the alienatiõ is neceſſarie, not voluntary, that is to ſay, whẽ the reſt of the teſtators goods will not ſuffice to pay his debtes: for then it is lawfull for the executor to ſell the ſame goods prohibited to be ſolde[n].

n) d. §. diui. in fin. L. peto. §. prædium. ff. de legat. 2. Iaſ. & Ripa. in d. §. diui

The ſeconde, when the alienation is momentanie, or of a ſhort time, not perpetuall, with a couenant to reſtore the thing alienated againe[o].

o) Angel. in L. voluntas. C. de fideicommiſſ. Ripa. in d. §. diui. n. 10. vbi limitat hanc exceptionem duob⁹ modis.

The third exception is, when the thing bequeathed is in place farre diſtant from him to whom it is bequeathed, and who by reaſon thereof, cannot haue any benefite thereby, if he ſhould not alienate the ſame: for then the prohibition

hibition of alienation, beeing made in his fauour, it ſeemeth that he may alienate the ſame[p].

The fourth is, when the alienation is made by him who is the laſt of the familie, in whoſe fauour the teſtator did prohibite the thing bequeathed to be alienated[q].

The fift is, when the executor being prohibited to alienate the thing bequeathed, except to certaine perſons, and the offering to ſell the ſame vnto them, they refuſe to buie it. In which caſe hee maye ſell the ſame to others, notwithſtanding the prohibition[r].

The ſixt is, when the thing bequeathed was firſt ſold to the perſon permitted by the teſtator, for afterwardes it may be ſimplie ſold to any other[s].

The ſeuenth is, when the executor or legatarie doth ſell the fruites and commodities of the things bequeathed, during his his life[t].

Diuers other exceptions there bee[v] concerning this preſente purpoſe, becauſe I doo not ſee howe there can bee any great vſe thereof in the eccleſiaſticall Court, I haue omitted the ſame, ayming eſpecially at theſe caſes whereof there is like to be moſt vſe, and moſt benefite to the reader: Onely this thing I thought good to adde in this place, that where † the teſtator doth make an executor, and giue him the reſidue of his goods conditionally, if he do not alienate the ſaide reſidue of goodes, the executor cannot be admitted to the executorſhip, vnleſſe hee firſt enter into bondes not to alienate the ſame[x].

Within

p) Bald. in L. voluntas. C. de fideicommiſſ.

q) Iaſ. & Ripa. in d. §. diui.

r) Iaſ. in rep. d. §. diui. n. 8. per L. qui Romæ. §. cohæredes. ff. de verb. ob.

s) Iaſ. in rep. d. §. diui. n. 76. per. L. pater. §. quindecim. ff. de leg. 3.

t) Iaſ. in rep. d. § diui. n. 84. poſt. Bar. in L. codicillis. §. Inſtitutio. ff. de leg. 2.

v) De quibus Iaſ & Ripa. in d. §. diui. & Vig. in ſua metho do iur. ciuil. part. 4 lib. 14. c. 11. in prin.

x) L. 4. §. idem Iulianꝰ. ff. de cond. Inſtit. & ibi Bald. Iaſ & Ripa. in d. §. diui. quæ ſententia firmior erit exiſtente cohærede, ſeu coexecutore. Cui Mutiana præſtari poſſit cautio.

Within vvhat time the condition maie or ought to be performed, no certaine time being limited by the teſtator.

1 *In this queſtion, three times, and three conditions, are to be conſidered.*
2 *Whether the condition may bee perfourmed before the making of the will.*
3 *When the condition is arbitrarie, the ſame muſt be performed after the death of the teſtator.*
4 *What if the arbitrary condition be ſuch as the ſame cannot be iterated.*
5 *What if the arbitrarie condition haue relation to the time paſt.*
6 *Caſuall and mixt conditions may bee performed before the making of the teſtament, if the teſtator were ignorant of the performance.*
7 *If the teſtator did know of the former performance, it muſt be performed againe if it be poſsible.*
8 *Whether the condition may bee performed during the time betwixt the making of the teſtament, and the death of the teſtator?*
9 *Within what compaſſe of time, may or ought the condition to bee performed after the death of the teſtator.*
10 *The condition being arbitrarie, it is materiall whether the condition bee impoſed on the executor or legatarie.*
11 *The executor may at any time accompliſh the arbitrarie condition after the teſtators death.*
12 *Whether the ordinarie may limit a certaine time for*

for performance of the condition.

13 *The legatarie muſte performe the arbitrarie condition, ſo ſoone as he can.*

14 *The reaſon wherefore the executor hath longer time of performing an arbitrarie condition, then the legatarie.*

15 *No time dooth preiudice the legatarie, whiles hee is ignorant of the condition.*

16 *If the condition be caſuall, it may be accompliſhed at any time.*

17 *What if the condition bee extant after the death of the legatarie.*

18 *If the condition bee mixt, it may bee performed at any time.*

19 *What if the condition do concerne mariage, whether ought it to be performed within three yeares?*

§. xiiij.

IF † wee will vnderſtande within what compaſſe of time the condition whereuppon the executor is made, or any legacie bequethed, may be or ought to be performed, where there is not anie certaine time limited by the teſtator, we are to conſider three ſeuerall times, and three ſeuerall ſorts of conditions. 1

Of the three times, the firſt is the time *before the making of the teſtament*: the ſeconde is the time *betwixt the making of the teſtament, and the death of the teſtator:* the third is the time *after the death of the teſtaior*[a].

Touching the conditions wee are to conſider,

a) L. ſi iam facta. ff. de cond. & demon.

ſider, whether the ſame bee *arbitrarie, caſuall,*
2 or *mixt*[b]. For the† time before the making of the teſtament, if any do inquire whether within that time, the condition may bee performed: It
3 is to bee anſwered, that † if the condition bee *arbitrarie*, that is to ſay, ſuch as dooth conſiſt in his power on whome it is impoſed, the ſame cannot bee perfourmed but after the death of the teſtator[c]. For example, the teſtator maketh thee executor, or giueth thee a hũdred pound, if thou wilte goe to the Church, or if thou wilt giue ten pounde to the poore: In this caſe it is not ſufficient that thou didſt go to the Church, or that thou diddeſt giue tenne pounde to the poore at anie time before the making of the teſtament, or yet after the making of the teſtament, before the death of the teſtator: for an arbitrarie condition muſt bee performed after the teſtators death[d], ſauing in ſome caſes. One †
4 is when the condition cannot bee iterated: for then it is ſufficient that the ſame was performed in the life time of the teſtator, euen before the making of the teſtament[e]: for example, the teſtator maketh thee executor, or giueth thee an hundred pound, if thou ſhalt remit vnto A.B. the debt which he oweth thee, and burne the obligation; which thing is by thee alreadie done: In this caſe it is ſufficient that thou haſt done it, ſeeing it cannot be iterated[f]. And this I ſuppoſe to bee true, not onely if the teſtator be ignoraunt of the performance of the condition[g] (for it is not likely that he woulde haue impoſed anie condition to haue beene perfor-

b) L. vnic. §. ſin autem. C. de cad. toll. & ſupra ead. part. §. 5.

c) L. 2. de condic. & demon. ff. L. ſi quis hæredem. de inſtit. & ſub. C.

d) Gloſſ. & DD. in d. L. ſi quis hæredem. & hoc etiam fieri debet, non fato aut caſu, ſed animo & ſtudio implendi conditionem, vt habet communis omnium Interpretum ſententia. teſte Graſſo. Theſaur. com. op. §. legatum q. 57. & huc faciunt quæ ſuperiùs dicta ſunt ead part. §. 7. in princ.

e) L. ſi iam facta. L. hæc conditio. ff. de cond. & demon. Paul. de Caſtr. in d. L. ſi quis heredem. n. 4.

f) L. hæc conditio. cl. 1. ff. de cond. & demon. Bar. in L. 2. de cond. & demon. Paul. de Caſtr. & Sichard. in L. ſi quis hæredem. de inſtit. & ſub. C.

g) d. L. ſi iam & facta. & L. hæc conditio. cl. 1. ff. de cond. & demon. & eo loci Interpretes.

med, if he had knowen the ſame to haue beene performed before, and that it could not be performed againe) but alſo, if hee did knowe the condition to haue beene performed before, in which caſe the condition not being iterable, is impoſſible, and ſo reiected, the diſpoſition remaining pure and ſimple[h]. Another exception is, when † the condition is referred to the time paſt: For example, the teſtator maketh thee his executor, or giueth thee ſome legacie, if thou haſt done this or that thing[i]. In which caſe it is not only ſufficient, that the condition was performed before the making of the teſtament, but it is neceſſarie that it ſhould ſo bee, for obteining the executorſhip or legacie[k]. 5

But if † the condition be not arbitrarie, but either *caſuall or mixt*, that is to ſay, either wholy without the power of the perſon on whome it is impoſed, or partly in his power, & partly in the power of ſom other[l]; thē it is material whether the teſtator were ignorāt of the accōpliſhment of the condition when he made his teſtament, or not: for if the teſtator, when he made his teſtament, were ignorant that the condition was performed before, the ſame is deemed to be ſufficiently complete[m]. Example of the caſuall conditiō, the teſtator maketh thee his executor, or giueth thee an hundred pound, if his ſhip ſhall returne from Venice: this ſhip is returned alreadie, but the teſtator is ignoraunt thereof, at the time of making his teſtament. In this caſe the condition is ſufficiently extant, as if the ſame had returned after his death[n]. Example 6

h) Graſſ. Theſaur. com. op. §. legatum. q. 57. in fin. per L. quæ ſub conditione. §. quoties. ff. de cond. inſtit.

i) L. talis inſtitutio. de cond. inſtit. L. cum ad præſens. ſi cer. pe. ff.

k) d. L. Inſtitutio talis.

l) Bar. in L. 1. C. de Inſt. & ſub. ſupr. ead. part. §. 5. in fin.

m) d. L. ſi iam facta. ff. de cond. et demon. d. L. ſiquis hæredem. C. de inſtit. et ſub.

n) L. hæc conditio. §. ſi fic. ff. de cond. et demō. et d. L. ſi quis hæredē.

ample of the next condition: the teſtator doth make thee his executor, or giueth thee an hundred pound, if thou take a wife; thou haſt a wife alreadie, but the teſtator did not then knowe ſo much, when he made this condition. In this caſe alſo thou art reputed to haue ſufficientlie accompliſhed the condition °.

o) Mantic. de coniect. vlt. vol. lib. 11. tit. 18. n. 16. per d. L. ſi quis hæredem. et d. L. ſi iam facta.

7 But if † the teſtator were not ignorant thereof, but did knowe of the returne of his ſhippe, and of thy mariage, at the time when hee did impoſe the condition, then the condition is not reputed to be extant or accompliſhed: but it is to be vnderſtoode of the next returne, and of thy next mariage ᵖ. Howbeit, if the condition were ſuch, that the ſame could not be iterated, then it ſhould bee reputed for extant and accompliſhed: albeit the teſtator at that time when hee did impoſe the condition, were not ignorant of the accompliſhment thereof: For example, the teſtator maketh thee his executor, or giueth thee an hundred pound, if thou ſhalt bee baptized, or if thou ſhalt take his daughter to wife: for it is ſufficient, albeit the teſtator did knowe thee to bee baptized before, or that thou haſt taken his daughter to thy wife before, ſeeing the condition cannot bee iterated ᵍ.

p) L. ſi ita ſcriptum. ff. de leg. 2. Mantic. de coniect. vlt. vol. tit. 18. lib. 11. n. 16.

q) L. quæ ſub conditione §. quoties. de cond. inſt. L. hæc conditio. el. 1. et L. ſi iam facta. de cond. et demon. ff. L. ſi quis hæredem. de inſt. et ſub. C. et DD. in dictas LL.

8 Concerning † the ſecond time, that is to ſay, the time betwixt the making of the teſtament, and the death of the teſtator; if any be deſirous to knowe, whether the condition may be performed during this time, I referre him to that which hath beene ſaide immediatly before:

that is to say, either is the condition arbitrarie; and then it is not sufficient to performe the same, so long as the testator liueth, vnlesse it bee such a case as cannot be iterated; or that the cõdition dooth respecte the time past; or else the condition is casuall, or mixt; and then it is sufficient that it is compleated whiles the testator liueth, for seeing it is sufficient, if it bee performed before the making of the testament, much more if it be performed after the making of the testament.

Concerning † the thirde time, which is the time after the testators death, if we would now also knowe within what space or compasse of time immediately from his death, the condition maie or must bee performed, no certaine time being prescribed by the testator, wee must first inquire the nature of the condition, obseruing diligently as before, whether the same bee *arbitrarie*, *casuall*, or *mixt*, for according to the diuersitie of the conditions, Lawe hath determined diuerslie. 9

In the *first* case, viz. when † the condition is arbitrarie, we are to consider whether the same be imposed on the executor or on the legatarie. If the † condition bee imposed on the executor, the same may be performed at anie time, so long as the executor liueth[r]: For example, the testator maketh thee his executor, if thou shalt giue to the poore tenne pound. In this case thou maiest at anie time during thy life accomplish the eond tion, and it is of the same effect, as if thou haddest performed the same immediately 10 11

r) L. si quis instituatur. §. 1. de hæred. instit. ff.

12 ately after the testators death[s], vnlesse the † ordinarie doo appoint a certaine competent time for the performance thereof, for so he may doo in this case (as hereafter is more fully declared[t]) within which time if thou doo not accomplish the condition, he then may commit the administration of the goodes of the deceassed, as of

13 one dying intestate[v]. If the † condition do appertaine to the legatarie, then the same must bee performed so soone as the legatarie conueniently may performe the same, or else the legacie is lost[x]. For example, the testator dooth bequeath vnto thee an hundred pounde, if thou wilt goe vnto the Church, or giue ten pound to the poore. In this case so soone as thou arte well able to goe to the Church, or to giue the ten pounde after the death of the testator, thou must performe the condition, otherwise thou

14 hast lost thy legacie[y]. The † reason of the difference betwixt the executor and the legatarie in this respect, is, because greater preiudice maie growe to the executor, by vndertaking the executorship, then to the legatarie by accepting the legacie. And therefore in equitie the executor ought to haue longer time, to deliberate of the performance of the condition, and vndertaking of the burthen of the executorship, then the legatarie, to whom no preiudice at all may happen, or not so much, as to the execu-

15 tor[z]. Notwithstanding † if the legatarie were ignorant of the testament or condition, so long as he is ignorant, no negligence is to bee imputed vnto him, nor any preiudice dooth growe

s) Gloss. Bar. et Bald. in d. §. 1. Graff. Thesaur. com. op. §. legatum. q. 57. n. 2.

t) Infr. ead. part. §. 16.

v) Bar. Bald Paul. de Castr. in d. L. si quis. §. 1. et infr. ead. part. §. 16.

x) L. hæc conditio. ff. de cond. et demō. Dec. in L. 1. de instit. et sub.

y) Bar. in d. L. hæc conditio. Alex. in L. si insulam. n. 24. Ripa. n. 103. de verb. ob. ff. quæ opinio communiter est recepta; ait Graff. Thesaur. com. op. §. legatum. q. 57. n. 2.

z) Graff. vbi supr. Bar. Bald. Castr. & alij in L. si quis. §. 1. ff. de hæred. instit.

vnto him, by not perfourming the condition, as otherwise it might, if he had knowne thereof[a].

a)Bald. in L. 1. C. de Inſtit. & ſub. n. 20.

In the *ſecond* caſe, that is to ſay, when the condition † is caſuall, then the euent therof is 16
to be expected, and whenſoeuer the ſame ſhall be extant, then maie he that is made executor, or to whom anie legacie is left vpon ſuch caſuall condition, be admitted to the executorſhip, or obtaine the legacie, and not before[b]: As for example, the teſtator maketh thee his executor, or giueth thee an hundred pounde, if his ſhippe returne from Venice. In this caſe whenſoeuer the ſhippe ſhall returne from Venice, during the life of the executor or legatarie, then is he to be admitted to the executorſhip, and may obtaine the legacie, but not before[c]. So that † if hee die 17
in the meane time, the executorſhip or legacie ſhall not be tranſmitted to his executors or adminiſtrators, although the condition be extant afterwardes[d]; vnleſſe ſome legacie be left vnto the Prince, who if he die before the condition bee extant, yet is the ſame due to his ſucceſſors, in whoſe time the condition is extant[e], or vnleſſe it bee the will and meaning of the teſtator, that the ſame be tranſmitted: for the teſtator, if he will may make the ſame tranſmiſſible, which otherwiſe is not tranſmiſſible[f].

b)L. intercidit. de cõd. & demon. L. fideicommiſſa. §. ſic. fideicõmiſſ. in fin. de leg. 3. ff.

c)d. L. intercidit. L. vlt. §. fin autem. C. de cad. tol. Tiraquel. de retract. §. 1. gloſſ. 2. n. 25.

d)L. liber. § ſi ita de hęred. inſtituend. L. in teſtõ. de cond. & demon. ff. L. vnic. §. ſin autem. C. de cad. tol. Zaſ. in L. ſi decem. ff. de verb. oblig.

e)L. quod principi. ff. de leg. 2.

In the *third* caſe, that is to ſay, when the † 18
condition is mixt, then the ſame maie bee accompliſhed at any time, as in caſual conditions, except the condition be of mariage[g]. But if the teſtator † make thee his executor, or giue thee 19
an hundred pound, if thou marrie: In this caſe verie

f)L. in conditionibus. §. 1. ff. de cond. & demõ. Mantic. de coniect. vlt. vol. lib. 11. tit. 10.

g)Laſ. in L. 2. de Inſtit. & ſub. C.

verie manie be of this opinion, that thou ought-test to marrie within three yeeres[h]. Others are of a contrarie opinion, and that it is sufficient to marrie at anie time, either within three yeeres or after[i]. In which contrarietie of opinions, I suppose that if the executor be appointed vpon condition, if he marrie, that then he maie at any time accomplish the same, not onelie within three yeeres, but after[k]. But if a legacie bee giuen vppon condition, if the legatarie marie, then it is the common opinion of the writers, that the legatarie must be married within three yeeres, or else the condition is saide to bee deficient, and so is the legacie lost[l]. And albeit the other opinion is said to be truer, that the condition is sufficiently accomplished by marying after three yeeres[m], yet the iudge may not easilie depart from the common opinion: for whatsoeuer is affirmed for the truth of the singular opinion; yet that is presumed to be the truer opinion, which is more commonly receiued[n]. The reasō of the difference wherefore the legatarie is excluded rather then the executor, if he doo not marrie within three yeeres (as is before shewed) namely, for that the executor otherwise is subiect to more perill then the legatarie[o].

h) Bar. in L. 2. §. ad filiorum. C. quādo & quibus quarta pars. Iaſ. Sichard. & alij in L. 2. C. de Inſtit. & ſub.

i) Paul. de Caſtr. in d. L. 2. Mantic. de coniect vlt. vol. lib. 11. tit. 18. n. 23.

k) Paul. de Caſtr. ind. L. 2. Graſſ. Theſaur. com. op §. legatum. q. 46. n. 18.

l) Bar. Iaſ. Dec. Sichar. & alij, in d. L. 2. quorum opinio communis eſt, inquit Graſſ. Theſaur. com. op. §. legatum. q. 46. n. 18.

m) Mantic. de coniect. vlt. vol. lib. 11. tit. 18. n. 23. Graſſ. vbi ſupr.

n) Coraſius. Trac. com. op. lib. 2. caſ. 14.

o) Vt ſupra in pluribus.

Of the vnderstanding of this condition, viz. *If he die without issue.*

1 *Manifolde questions by occasion of this condition,* if he die without issue.

2 *Whether he be said to die without issue, whose issue*

is naturall, but not lawfull.

3 *What if the father and mother doo afterwards marie together.*

4 *When the issue is lawfull, not naturall, whether he be saide to die without issue?*

5 *What if the childe were got by another man before marriage.*

6 *If another haue to do with the wife besides her husband, yet the child shall be deemed the husbands.*

7 *Diuers extensions of this conclusion.*

8 *What if the childe be like the adulterer.*

9 *How commes it to passe, that the childe is sometimes like vnto another then him which did beget it.*

10 *In some cases the husband shall not bee iudged the father of the child begotten during mariage.*

11 *Whether shall the childe be the former or the seconde husbandes, when it is vncertaine whether of them did beget him.*

12 *Whether hee bee saide to die without issue, who had children, but not at his death.*

13 *Difference betwixt this condition,* If hee die without issue, *and this,* If he haue no issue.

14 *Whether that father is to be deemed to die without issue, whose child is vnborne when he dieth.*

15 *Whether he be deemed to haue died without issue, whose child dieth so soone as it is borne.*

16 *If the childe be heard to crie, the father shall be tenant by the curtesie.*

17 *What if the childe were not heard to crie.*

18 *What if the issue be borne dead, or dieth as it is borne.*

19 *What if a monster be borne, whether shall the parents be iudged to haue died without issue.*

20 *What*

20 *VVhat if the childe in the mothers wombe, being made executor, ſhe be deliuered of diuers children at one birth, whether ſhall euerie of them bee executors?*

21 *VVhat is to be obſerued in legacies, where moe are borne at one birth.*

§. XV.

1 AS there † is no cõdition more vſual then this, (*If he die without iſſue*) ſo there is none that dooth miniſter moe queſtions (although ſome of them be not altogither ſo difficult) which thing that it may the better appeare, let vs firſt ſuppoſe that the teſtator doth make thee his executor, or dooth bequeath vnto thee an hundred pound, if he die without iſſue. This caſe dooth miniſter all theſe queſtions, What if the teſtator haue iſſue *naturall, but not lawfull?* Or what if he haue iſſue *lawfull, but not naturall?* What if he haue iſſue *both naturall and lawfull, but the ſame dieth before the father?* Or what if hee beget his wife with childe, and then *die before the childe be borne?* Or what if *the child die before it be borne?* Whether ſhall the teſtator bee indged to die without iſſe; yea, or no? All theſe and manie moe like queſtions, may be demaunded by reaſon of that cõdition (If he die without iſſue) whereunto I ſhall anſwere in order as they bee propounded: preſuppoſing that to haue iſſue, is to haue a childe, or children: and to die without iſſue is to die with out any childe.

When † the iſſue is *naturall, but not lawfull*, if 2
the will and meaning of the teſtator do not ap-
peare, the teſtator is deemed to haue died with-
out iſſue [a]: for it is not likelie that an honeſt per-
ſon ſpeaking of children, did meane of baſtards,
but of lawfull children [b]: Inſomuch† that if the 3
teſtator do beget a childe, and after the birth of
the childe marie the mother: yet in this caſe I
am of this opinion, that by the lawes of this
realme he ſhall be iudged to haue died without
iſſue. For thou ſhalt vnderſtande that in the
time of King Henrie the thirde [c], this queſtion
being propounded in the Parliament, *Whether
one borne before matrimonie might inherite, as one
borne after matrimonie?* All the Biſhops anſwe-
red, and ſaide, that it was againſt the common
order of the Church, that ſuch ſhoulde not in-
herite [d]: and they all inſtanted the Lordes tem-
poral and Barons then aſſembled in Parliament
that they woulde conſent, that all they that
were borne before matrimonie, ſhould bee le-
gitimate, as well as they that were borne with-
in matrimonie, concerning the ſucceſſion of
inheritaunce, for as much as the Church ac-
cepted ſuch as legitimate. But they all with one
voice anſwered, that they woulde not chaunge
the lawes of this realme, which hitherto had
beene vſed and obſerued [e].

When † the iſſue is *lawfull, not naturall*: By 4
lawfull iſſue in this place, I vnderſtande that
childe which is begotten of a married woman,
by another then her husband [f], (for of adoptiō,
arrogation, or any other meanes to make chil-
dren

a) L. in conditionibus. de cond. & demon. L. ex facto. §. ſi quis rogatus. ad Trebel. L. vulgo de ſtatu hom. ff. Mantic. de coniect. vlt. vol. lib. 11. tit. 9. in prin. Sichard in L. generaliter. §. cum autem. C. de Inſtit. & ſub. Bract. de leg. & conſue. Angl lib. 5. c. 30. n. 10. in fin.

b) Ripa. in d. L. ex fact. §. ſi rogatus. ad Trebel. ff. n. 16. Graſſ. Theſaur. com. op. §. fideicommiſ. q. 37. n. 6.

c) Merton. c. 9. an. 20. H. 3.

d) Per c. 1. & c. tanta. qui filij ſunt legit. extr. §. vlt. Inſtit. de nuptijs. c. nullum. 3. q. 5.

e) Merton. c. 9. an. 20. H. 3.

f) Bracton. de conſuet. Angl lib. 2. c. 29. n. 4. verb. & licet.

dren lawfull, except marriage, wee haue no vſe here in England [g],)In this caſe, firſt of all, the meaning of the teſtator is to bee regarded[h], the which if it doo not appeare, then it ſeemeth by the lawes of this realme, that hee is reputed not to haue died without iſſue, but as if he had got it himſelfe: becauſe by the ſame lawes [i] it is pro-
5 uided, † that if a man take to wife a woman, which is great with childe by another that was not her husband, and after the childe is borne within eſpouſalles or mariage; he which maried the woman, ſhall bee ſaide to bee the father of the childe, and not hee which did beget the ſame, although the childe were borne the next day after the mariage ſolẽnized[k]: for whoſe the cow is, as it is cõmonly ſaid, his is the calfe alſo[l].

6 Much more † if after the mariage an other man haue carnal coniunction with his wife ſhal the husbãd be deemed the father of that child, which is not onely borne, but begotten during mariage: for then by al lawes the husband is preſumed to haue begotten the childe himſelfe, and not the adulterer[m], albeit another
7 had to do with her beſides her husbãd. Which† concluſion becauſe it is in fauour of matrimonie, and tendeth to the benefite of children, is diuerſly extended.

Firſt therefore, although the mother doo cohabite with the adulterer, yet if the husbande haue free acceſſe vnto her, he is preſumed to be the father and not the adulterer[n]. For albeit it bee likelie that the adulterer did begette the childe, yet ſeeing it is poſſible that the husband did

g) Tract. de repub. Ang. lib. 3. c. 7.
h) d. §. ſi quis rogatus. L. vlt. C. de his qui væn. ætat. imp. L. Sancimus. de nuptijs. C. Mantic. de coniect. vlt. vol. l. b. 11. tit. 8. in prin.
i) Bract. vbi ſupr. Fitzh. Abridg. tit. baſtardy. n. 1. 4. Brook. eod. tit. n. 43. in fin. Tract. de repub. Ang. lib. 3 c. 6.
k) Iuxta illud, pater eſt quem nuptiæ demonſtrant.
l) Quod tamen non eſt ſimpliciter verum in viduis, vt per Termes of lawe, verb. baſtardy. et infr. d. §.
m) I.. filium. de his qui ſunt ſui vel alien. iur. L. miles. §. defunct. de adul. ff. & ibi Legiſtæ. c. Michael. de fil. præsbit. c. per tuas. de probac. ext. & ibi Canoniſtæ. Bract. de leg. & conſuetud. Angl. lib. 2. c. 29.
n) Bald in L. ſi à matre. C. de ſuis & legit. Abb. in c. accedens de purg. cano. ext. Maſcard. de probac. verb. filius. concl. 788.

did beget it: Honeſt poſſibilitie is preferred before that other poſſibilitie, which is linked with diſhoneſtie[o]. Secondly, albeit the wife were as common as the Cart-waie, making an open profeſſion of her filthineſſe, yet the huſband, if ſhe be not altogether out of his guard, ſhall be iudged the onely father[p]. Thirdly, albeit the mother had beene barren a long time beefore, yet the childe is preſumed to haue beene begotten by the husbande, and not by the adulterer[q]. Fourthly, albeit the mother doo confeſſe that the adulterer did beget the childe, yet her ſole confeſſion dooth not hurt the childe[r].

Fifthly, albeit the childe be borne blind, or lame, yet is the husbande preſumed to haue begotten the ſame, and not the adulterer[s]. In which caſe, neuertheleſſe ſome haue beene of this opinion, that this childe was begotten in adulterie[t], being ſo borne (as they imagined) by Gods prouidence and iuſtice, becauſe of the ſinne of the parentes: whoſe raſh opinion is by others refelled as erronious and blinde[v], hauing no better grounde then had their conceipt, who asked of our Sauiour Chriſt (as he paſſed by a blinde man) who had ſinned, he or his parentes, that he was borne blind[x]: To which demaunde our Sauiour anſwered: neither he nor his parents, but that the power of God might be made manifeſt[y].

Sixtly, albeit† the childe bee verie like the adulterer, yet ſhall the husbande bee deemed the

o) Bald. in d. L. filium. de his qui ſui, vel alien. iur. ff. Palæotus de Noth. & ſpur. c. 24.

p) Cyn. poſt Iac. de Butr. in L. ſi minus. C. de nup. Gab. lib 1. tit. de præſump. concl. 14. n. 9. Maſcar. de pbac. d. concl. 788. n. 39.

q) Ab. in c. per tuas. de pbac. ext. Alcia. de præſump. reg. 3. præſump. 37. Gabr. d. cõcl. 14. n. 8

r) Abb. in c. officij. de pœniten. extr. quod procedit etiamſi patris confeſſio accederet Palæot. de Noth. & Spur. c. 24. n. 2. Alciat. de præſump. reg. 3. præſump. 37. n 6. Petr. Duen. Tract. reg. & ſal. verb. filius. reg. 344. contra Bald. Anch & Alex. de quibus Gabr. d. concl. 14. n. 13.

s) Couar. epitom. de ſponſal. 2. part. c. 8. §. 3. n. 8. Maſcard. d. concl. 788. n. 18. Petr. Duen. d. reg. 334. limit. 2.

t) Barba. in c. præſentia de pro bac. extr. & in conſ. 68. in prin. vol. 4. Alex. conſ. 157. vol. 5. Dec. conſi. 188. Hyppol. Sing. 530. vbi alios citat huius opin. Authores quamplures. Quib⁹ ſi placeat, adde Ed. Fẽró. Anglũ. Tract. de mirabil. ſecret. naturę. c 5.

v) Couar. de ſponſ. c. 8. §. 3. n. 8. 2. part. Duen. d. reg. 344. in fin.

x) Euangel. §. Iohan. c. 9. in prin.

y) eod. c. 9. verſ. 3.

the father[z]. Wherein diuerſe (I confeſſe) of no ſmall auᶜthoritie haue contended mightilie, that this childe is to bee adiudged the adulterers[a], fortifiyng their aſſertion with this reaſon eſpecially, becauſe in other creatures nature hath ſo prouided, that each thing dooth beget that which is like vnto it ſelfe[b]: yet contrariwiſe, their opinion hath preuailed (as being armed with argurnents of the inuincible truth,) who defende that the husbande ought to bee iudged the father of that childe which is ſo like the adulterer, and ſo vnlike himſelfe[c]. Neither is that other reaſon of ſuch force as is pretended becauſe † this forme or ſimilitude maie happen to the infant by the mothers ſerious cogitation or firme imagination at the time of the conception[d]: For proofe whereof we may read in the holie Scriptures, howe by Iacobs deuice of the ſpotted ſtickes being laide before Labans ſheepe at the ramming time, the lambs became ſpotted[e]. Famous alſo is that accident (regiſtred in the bookes of ſundrie writers[f]) of a beautifull ladie, who hauing a husband of a faire and white complexion, was deliuered of a childe as blacke as pitch, like vnto a Moore or Ethiopian: and hereupon being accuſed of adulterie, ſhee was acquited and abſolued, for that by the opinion of the beſt learned in phiſicke and philoſophie, the ſame did ſo come to paſſe by reaſon of the picture of a black boie, or litle Nigro, which did hang in the bedchamber at the time of the cõceptiõ. Like vnto this is that credible hiſtorie of another woman in the time of

9

z) Bald. in L. Gallus. de lib. & poſthu. ff. n. 13. Paul. de Caſtr. conſil. 257. vol. 3. Alciat. d. præſump. 37. n. 3.

a) Alberic. in L. 7. ff. de ſtat. hom. Pariſ. conſil. 10. vol. 2. n. 59. Bald. conſ. 390 vol. 2. Fulgoſ conſil. 212. col. 3. Coraſ. L 2. Miſcel. c. 22. n. 5.

b) Pariſ. Coraſ. & alij, vbi ſupr. Tiraquel. de leg. Conub. leg. 7. Maſc. de probac. concl. 792. n. 2.

c) Bar. Iaſ. & communiter DD. in L. Gallus. ff. de lib. & poſth. quã ſententiam propiùs ad veritatem accedere refert Maſcard de probac. d. concluſ. 792. n. 7.

d) Alciat. d. præſump. 37. poſt Bald. in d. L. Gallus. vnde mulieres ſimulachra ſæpiſsime ſtatuaſque in delicijs habuiſſe legitur, ſimileſque ijs partus enixas. Coraſ. d. c. 22. n. 2.

e) Geneſ. c. 30.

f) Iaſ. in L. Gallus. ff. de lib. & poſthu. n. 69. Coraſ. lib. 2. Miſcel. c. 22. Fenton. de ſecretis naturæ. c. 5.

of Charles the fourth, Emperour and king of Boemia, who becauſe ſhe had too much regard to the picture of Saint Iohn clothed in a Camels skinne, which did hang at the beds feete during the conception, ſhee brought foorth a childe all rough, couered with haire like vnto a Beare[g]. The hiſtories are full of theſe kinde of accidents, I ſhal cõtent my ſelfe with one more, which did befall in the time of the Emperour Maximilian, in a towne in Brabant[h]: There in a publike plaie or ſpectacle, a certaine man whoſe part was to plaie a dauncing deuill, aſſoone as the plaie was ended, ranne home to his wife in his deuils attire: and being moued in ſpirit, catched his wife haſtilie in his armes, and muſte needes &c. in that habite, ſaying he would beget a deuill; and ſo it came to paſſe, that at her childes birth ſhee was deliuered of a deuilliſh monſter, which as ſoone as it was borne, began to leape and daunce like to the father. Which examples (with diuerſe other like experiments) being made notorious, manie women (that they might bring foorth beautifull children) haue gotten beautifull pictures, and fixed the ſame nigh to their beddes, and haue in deede oftentimes brought foorth children like vnto thoſe pictures, in the ſight whereof they were formerlie moſt delighted[i]. Seeing then the conceite or imagination of the woman is of ſuch force in the act of generation, that whoſe forme or ſimilitude is then in their minde, the ſame is not ſeldome repreſented in the childe[k]: What maruel thẽ if the child which is begotten by the adulterer

g) Coraſ. in annotac ſuper quodam Arreſto Tholoſſ. fol. 31. Fenton. vbi ſupra.

h) Coraſ. in d. annotac. cod. fol. 31. Lùdouic. Viues in 12. lib. Auguſ. de ciuitat. Dei.

i) Plutarch. de placitis. philoſ. lib. 5. c. 12. Coraſ. in d. c. 22. n. 2. lib. 2. Miſcel.

k) Gloſſ. in L. quæret aliquis. de verb. ſig. & in L. non ſunt. de ſtat. hom. ff.

adulterer bee like vnto the husband, when the adultereſſe fearing to be interrupted by his returne, who woulde take but ſmall pleaſure at ſuch ſporte, cannot but ſtill haue an eye to that doore, vntil the peril be paſt[l]? And wherfore thē alſo ſhoulde we wonder, that the childe which is begotten by the husband, ſhoulde bee like to the adulterer[m], vpon whoſe face and fauour her minde is fullie fixed, who in the middeſt of her delights imagineth the ſtolne water to bee the ſweeter[n]? Nay rather, it is to be maruailed that it ſhould bee otherwiſe, but that the almightie dooth ſtill reſerue his prerogatiue, beſides and contrarie to the courſe of nature, beſtoweth what formes it beſt liketh him, vpon euery creature. Other extenſions there bee of this rule[o], but let vs returne to the limitations.

10 The firſt limitation is this†, when the husband was not within the foure ſeas at ſuch time as the childe was conceiued[q], or at the leaſt was ſo farre abſent from his wife, or impriſoned the ſame time, that thereby it was impoſſible for him to haue begotten the ſame childe[r]. Which time of conception when it was, may beſt bee knowne by relation to the birth of the childe: For a woman cannot bring forth a perfect childe, before the beginninge of the 7 month[s]: neither can ſhee beare a childe in her wombe after the ende of the tenth moneth from the time of the conception at leaſt by preſumption of law[t], except it be for one, two or three daies

l) Alciat. de præſump. reg. 3. præſump. 37. Iaſ. & alij in d. L. Gallus. ff. de lib. & poſthu.

m) Bald. in d. L. Gallus. Maſcard. de probac. verb. filius. concl. 792.

n) Prouerb. Salom. c. 9. verſ. 17.

o) de quibus Maſcard. de probac. d. concl. 788. Petr. Duen. Tract. reg. & fal. reg. 344. Alciat. de preſup. 37. Menoch. de Arb. Iud. ſent. 89. Gabriel. de præſump. concl. 14.

q) Bract. de leg. & conſ. Angl. lib. 1. c. 9. in fin. & lib. 2. c. 29. n. 3. & 4. Kitchin. tit. diſcent. fol. 108. Brook. tit. baſtardy. n. 4.

r) c. ex tenore. de teſtib. extr. & Panor. ibid. Pariſ. conſil. 64. vol. 3. n. 6. 7. & conſil. 10. vol. 2. n. 36. 78. Maſcard. de probac. concl. 788. n. 40. Petr. Duen. d. reg. 344. lim. 3. Brook Abridg. tit. baſtardy. n. 4.

s) L. ſeptimo. de ſtat. hom. ff. ex ſententia Hyppocratis. lib. de partu ſeptimeſtri, à quo non diſſentiunt Ariſtotel. lib. 1. de natura animal. Plutarch. lib. 5. de placit. philoſ. c. 18. Plin. lib. 11. natural. hiſto. c. 31.

t) L. inteſtato. §. vlt. ff. de ſuis, & legit. & §. vlt.

Tiraquel. in rep. L. ſi vnquam. C. de reuoc. don. verb. ſuſceperit. vbi multa ſcitu non indigna de partu ſeptimeſtri & decimeſtri, ex Hyppocrate, Ariſtotele, & alijs, tùm Medicis, tùm Philoſophis deprompta, videre licet. Sed prę cæteris Legiſtis, præclariſſimè, & copioſiſſimè de naſcendi tempore, ſcripſit Gentilis noſter.

more

more at the verie fardeſt[v]: So that if the huſband did depart from his wife aboue tenne monethes with thoſe fewe daies added thereunto, nor retuned vntill within ſixe monethes next before her deliuerie, it is impoſſible for him to be the father of this childe, being otherwiſe a perfect childe.

Secondly, if the husband were not able to beget a childe, at ſuch time as his wife did conceiue, hee is not to be deemed the father of that childe[x]: For ſeeing law is but an arte of righte and good[y], by imitation of nature[z], it were againſt all right and reaſon that he ſhould be iudged the father of that childe, by fiction of lawe, which he could not beget by poſſibilitie of nature[a]: whether he were diſabled by grieuous ſickeneſſe[b], (eſpecially ſuch whereby thoſe parts of the generation are affected[c]) or it were by reaſon of olde age[d]. For howſoeuer it maie ſeeme a paradoxe to ſome, yet is it commonlie receiued for a true concluſion amongſt the learned, that as a womã in proceſſe of time becommeth barren, namely after fiftie yeares: ſo a man alſo is at the length depriued of the abilitie of begettinge a childe[e], that is too ſay, at foureſcore yeers, if not before:[f] neither is that contrarie where I ſaid before, that by the lawes of this realme, if a man take to wife a ſingle wo-

v) Accurſ. in d. §. vlt. Auth. de reſtit. & eaque parit, &c. Salmo in L. Gallus. de lib. & poſthum. ff. Menoch. de Arb. iud. queſt. lib. 2. caſ. 89. n. 41.

x) L. filium. ff. de his qui ſunt ſui, vel al. iur. & DD. ibidem. Gabr. lib. 1. com. concl. tit. de præſump. concl. 14. n. 19. Pract. Andr. Gail. lib. 2. obſeru. 97. n. 15.

y) L. 1. ff. de Inſtit. & iur.

z) §. minorem. Inſt. de adop. Pariſ. cõſil. 10. vol. 2.

a) Pariſ. d. conſil. 10. & conſil. 29. vol. 2. Bar. in L. ſi is qui ff. de vſucap. n. 22.

b) L. filium. ff. de his qui ſunt ſui, vel alien. iur. Maſcard. de probac. concl. 788. n. 40. 41. 42. Abb. & Felin. in c. per tuas. de probac. extr. Bracton. de leg. & conſuetud. Angl. lib. 2. c. 29. n. 5. & lib. 1. c. 9. in fin.

c) Menoch. de Arb. iud. quæſt. caſ. 89. n. 53. Pariſ. d. conſ. 29. n. 80.

d) Maſcard. de probac. concl. 788. n. 43. 44. Palæot. de Noth. & Spur. c. 24. n. 3. & ante eos ſcripſerũt Bald. & Cyn. in d. L. filium.

e) De hac re, vt de re qualibet præclare Tiraquel. de leg. conub. Lege 5. ſub finem. verb. Nec erit intempeſtiuum. (f) Socin. conſil. 65. vol. 3. Pariſ. conſil. 29. vol. 2. Menoch. d. caſ. 89. n. 57. Attamen in hoc regno Angliæ vulgò creditur, ſenes etiam plus quàm octogenarios, hac poteſtate non eſſe penitùs orbatos, eorúmque liberi communiter reputantur legitimi, & proinde ſuccedunt ijs ac reliqui, hoc impedimento non obſtante.

man great with childe by an other man, then he which married her ſhall bee the father of the childe, albeit ſhe were deliuered the next day after the marriage ſolemnized: For there it is poſſible for the husbande to haue begotten the childe: here impoſſible[g]. Now the lawe doth often preſuppoſe or allowe that for true which is falſe, becauſe it may bee true[h]: but the lawe dooth neuer preſuppoſe or feigne that thing to be which is impoſſible ſo to bee, for that were vnreaſonable, and againſt nature which directeth arte[i]. Againe, in that caſe he is worthilie the father of anothers baſtard, becauſe he when he is free, yet willinglie taketh her with all her faultes, whome hee knoweth to bee anothers whore: But here an honeſt man is greatly beguiled by her to whome he is alreadie tied, and therfore leſſe worthie to bee further afflicted[k]. But is it not manifeſt that many haue ſucceeded in the inheritance as lawfull & natural children of thoſe perſons, who neither were principall, neither acceſſarie, nor any way priuie to the begetting either of a leg or an arm, no not ſomuch as of the litlefinger of that iſſue? Indeed no maruaile, when there is not due proof of impoſſibilitie[l], the defect is not in lawe, but in proofe[m], which proofe is ſaide to be the chariot wherein the Iudge doth ride towards his ſentence[n]: Or howſoeuer ſuch iſſue is admitted to the ſucceſſion by interpretation of the lawes of this realme[o]: Yet when the teſtator ſpeaketh of iſ-

g) d. L. filium. quo etiã tendit quod Bractonus Iuriſconſultus Anglus, non minùs peritus, quã antiquus ſcriptum reliquit. Legitimus (inquit) & hæres iudicabitur, qui naſcitur ab vxore, dum tamen præſumi poſſit, quòd maritus potuit ipſum genuiſſe.

h) Bar. Angl. & alij, in L. ſi is qui pro emptore ff. de vſucap. Menoch. de præſump. lib. 1. q. 8.

i) Bar. in d. L. ſi is qui. n. 22. Alciat. de præſump. in princ.

k) Afflictio afflicto non eſt infligenda. Bar. in L. 2. ff. de no. op. nun. Bald. in L. præcibus. C. de impub. & al. ſub.

l) Nam cùm par militet in vtroq; caſu ratio, cur nõ idem ius? cur quęſo magis fauendum eſt abſenti, ne habeatur pro patre illius quem genuit alter, q̃ qui morbo, vel ſenio confectus generare nequeat? Quod ſi dixeris difficiliùs probari generandi impotentiam, quàm abſentiam: Attamen probatâ hac impotentia, eadem tunc prorſus manet hinc, ac indè ratio.

m) L. duo ſunt Titij. ff. de teſta. tutel.

n) Mantic. de coniect. vlt. vol. lib 4. tit. 11. n. 43.

(o) Immo non admittitur probatâ gignendi impotentia, ſi Bractono fidem adhibeamus. lib. 2. c. 29. n. 4. in fin. vbi non aliter ab alio genitum, pro maritĩ filio iudicandum fore cenſet, quam ſi præſumi poſſit, eum à marito gigni potuiſſe.

ſue, it is not likelie that hee did meane of ſuch iſſue, which is not aſwell naturall as lawfull[p], which meaning of the teſtator as in other caſes, ſo in this alſo ought to be obſerued[q].

Diuerſe other limitations there bee of this former rule, ſhewing that the childe is not to be aſcribed to the husbād, but to the adulterer[r]: namely, when the wife doth make an elopemēt from her husband[s], and doth altogether cohabit with the adulterer, and eſpecially if then alſo the childe bee borne blinde, or lame, or be like vnto the adulterer, for then it ſeemeth that the adulterer ſhall be iudged to bee the childes father, vnleſſe it be prooued that the husband had free & oftē acceſſe vnto the mother: but becauſe I doubt of the truth of theſe limitations, I dare not deliuer them for currant: neuertheleſſe in teſtamentes, the will and meaning of the teſtator is to be regarded, and ſo the husbande is to be iudged to haue had iſſue, or not to haue had iſſue accordingly[t]. What if the wife be maried to another husband very ſhortly after the death of her former husbande, and after her ſeconde mariage bee deliuered of a childe, whoſe iſſue ſhall this be, the former or the ſecond husbāds? If the wife were great, or apparantly with child at the death of her former husband, then there is no queſtion, but that the iſſue is to be aſcribed to the former husbande[x]. But if ſhee were not apparantly with childe, ſo that by poſſibilitie of nature, it might be the child, either of the former or the ſecond husbād, for that perhapps ſhe is deliuered within eight or nine monethes after

p) Mantic. de coniect. vlt. vol. lib. 11. tit. 8. n. 2. per L. vlt. de his qui væn. ætatis,

q) L. in conditionibus. ff. de cond. & demon. L. cùm quæſtio. C. de lega. §. diſponat in Auth. de nup. Dec. conſ. 399.

r) Quas videre eſt apud Gabr. lib. 1. com. concl. 14. Maſcard. de probac. con. 788.

s) Brook. tit. baſtardie. n. 4 Alcia. de præſump. reg. 3. præſump. 37. n. 11. Pariſ. conſil. 10. n. 34. vol. 2. Maſcard. de probac. concl. 788. n. 11.

t) Mantic. vbi ſupra. Paul. de Caſtr. conſil. 30. vol. 1.

x) DD. in L. Gallus. ff. de lib. & poſthu. Terms of law. verb. baſtardy. Kitchin. in tit. deſcent. fol. 108.

ter the death of her former husbande; yet not before the ſeuenth moneth next after her ſecond mariage, then the queſtion is much more doubtful[y]: wherein how manie heads, ſo many wittes; howe many men, ſo many mindes; and no man which hath not ſomewhat to ſay, as wel for the defence of his owne opinion, as for the confutation of the contrarie. But I will not trouble you with their tedions diſputations[z], I will briefly repeate their opinions touching this queſtion: Some therefore doo holde that the former husbande ought to bee iudged the father[a]: ſome that the ſeconde husbande[b]: Others that both[c]: and others againe that neither[d] is to bee deemed the father of the iſſue. Some ſay that the mother is to bee credited[e], which of them is the father: and ſome ſay that it is in the childe to elect and chooſe[f] whether of them hee will for his father: Others are of this minde, that he ſhall bee deemed the father by whom the child may receiue the greater benefite[g]: And others, that he ſhal be the father, vnto whom the childe is more like in fauour, complexion and proportion of bodie[h]: Manie do leaue it to the diſcretion of the circumſpect Iudge, who is not tied to anie one opinion alone, but according to the varietie and probabilitie of circumſtances (together with the aduiſe of Phiſitians, Midwiues, & eſpecially ſuch as bee skilfull in aſtrologie[i]) is to decide the controuerſie[k]. Finally, by the lawes of this

y) De qua. Bar. Bald. Alex. Iaſ. & alij. in L. Gallus. ff. de lib. & poſth. Alciat. de præſump. reg. 3. præſump. 37. in fin.

z) Si quis horum altercationes & pugnas videre cupiat, legat Iaſ. in d. L. Gallus. & Iacob. de Beluiſ. in quadam diſputatione, quam habet in L. 1. de bon. poſſ. ſecundum Tabul.

a) Multos in hac ſententia ſtetiſſe refert Coraſ. in annotac. ad Arreſtum quoddam Tholoſſ. fol. 33.

b) Anto. Vacca. in L. 7 ff. de ſtat. hom. poſt Imol. in d. L. Gallus.

c) Angel. in L. duo. de hæred. inſtituend. ff.

d) Iac. de Beluiſ. in d. diſputac.

e) Alciat. d. præſump. 37. n. 15. per L. etiam. ff. de probac.

f) Alex. in d. L. Gallus. n. 14. verſ. hoc tamẽ dictum. & cum eo conſentit Berry Iuſticiarius Angliæ, de quo Brook. tit. baſtardie. n. 18. in fin.

g) Dec. in c. per tuas. de probac. extra. n. 2. verſ. 4.

h) Coraſ. lib. 2. Miſcel. c. 22.

i) Apoſtil. ad Alex. in d. L. Gallus. vbi, Aſtrologi longè præponũtur medicis.

(k) Bar. in d. L. Gallus. cuius opinio & verior, & crebrior, & tutior eſſe dicitur, attento iure ciuili. Iaſ. in d. L. Gallus. n. 72. & Alex. in fin.

realme, at leaſt in caſes of ſucceſſion of lande, it ſeemeth that the ſecond husband ſhal be the father of this child[l], becauſe it being certaine that the childe is borne during the marying and cohabitation betwixt the ſecond husband and the mother, and vncertaine whether hee were begotten before, it were verie harde and daungerous to adiudge him to bee another mans child, rather then the ſecond husbands, who by poſſibilitie of nature may be his father[m], and to whom it is to be imputed, that hee aduentured ſo ſoone vpon an other mans widow[n].

l) Tract. de repub. Ang. lib. 3. c. 6. Termes of law. verb. baſtardy. Kitchin. tit. diſcent. fol. 108

m) Apoſtil. ad Bar. in d. L. Gallus.

n) Anto. Vac. in L. 7. de ſtat. hom. ff.

When the iſſue is *both naturall and lawfull, but* † *dieth before the father:* In this caſe the 12
father is ſaide to die without iſſue[o]. And therefore he that is made executor, or to whom anie thing is bequeathed vppon condition, if the teſtator die without iſſue, may in this caſe bee admitted to the executorſhip, or obtaine the legacy[p]: for albeit the teſtator may be ſaid to haue had iſſue, yet can it not be denied, but that he died without iſſu, becauſe at the time of his death he had no iſſue[q]. Indeede † if the teſtator make 13
thee his executor, or bequeath vnto thee a hundred pound vpon condition, if he ſhall haue no iſſue: then if the teſtator after the making of the will had iſſue, although the ſame were not extant, nor liuing at the time of the teſtators death, it is ſufficient to exclude thee from the executorſhip and legacie[r], vnleſſe it do appeare that the teſtator did meane of hauing children at the time of the death[s]: which meaning is ſaid to appeare ſometimes by this word (*then*[t],)

o) L. ex facto. §. ſi quis autem. ff. ad Trebel. Bar. in L. hæred. eod. tit. Zaſ. in L. in ſubſtitutione. de vulg. & pupil. ſub. Mantic. de coniect. vlt. vol. lib. 11. tit. 6. n. 3.

p) d. §. ſi quis autem.

q) Bar. in d. L. hæredib. Zaſ. in d. L. in ſubſtitutione. Mantic. in d. tit. 6 Graſſ. Theſau. com. op. §. fideicommiſſ. q 35.

r) Iac. de Are. Alberic. de Roſa. in d. L. ex facto. §. pen. Mantic. de coniect. vlt. vol. lib. 11. tit. 6. n. 5.

s) Mantic. vbi ſupr. Zaſ. in d. L. in ſubſtitutione. n. 15.

t) L. ſi his. §. ſi ita. de cond. & demon. ff. Zaſ. in d. L. in ſubſtitutione. a 15. fol. 3. o.

as when the teſtator ſaith, *If I haue no iſſue, then I will that A.B. bee my executor*, for this worde (*then*) is ſaide to ſignifie extremitie of time, ſo that it is not ſufficient that the teſtator had iſſue in the meane time[v], vnleſſe euen then hee had iſſue when his teſtament ſhoulde tak effect, which it can not doo ſo long as the teſtator liueth[x].

v) d.§.ſi ita.

x) Mantic. poſt. Bar. & Alex.d.lib.11.de cõiec. vlt.vol.tit.6.n.5.

14 When † the childe is in *the mothers wombe at ſuch time as the father dieth*; If we would in this caſe knowe, whether that man is to bee iudged to haue died without iſſue, wee muſte conſider whether it bee for the benefite of the childe that the father ſhoulde bee accounted to haue died without iſſue, or not: For howſoeuer the rule be, that he is not ſaide to die without iſſue, whoſe wife is with childe at his death[y]; yet that rule ought to take place when it tendeth to the benefite of the childe[z], not when it tendeth to the preiudice of the childe, or onely benefite of another[a]. Wherefore, if the teſtator make thee his executor, or giue thee an hundred pounde, if he die without iſſue, after which will made, he dieth, leauing his wife with child: In this caſe he is reputed to die without iſſue; and ſo thou art to be admitted to the executorſhip, & maiſt recouer thy legacie[b], vnleſſe it be more beneficiall to the childe, that his father ſhoulde haue beene reputed to haue died without iſſue: for then thou art excluded[c].

y) L.ſi quis prægnantẽ. de reg.iur.ff. L.iubem⁹. §.ſi quis autem. C. ad Trebel.

z) L.qui in vtero. ff. de ſtat.hom.

a) d.L.qui in vtero. Mantic.de coniect.vlt. vol.lib.11.tit.6.n.9

b) Mantic.d.tit.6.n.9. poſt.Bald.in d.L.qui.in vtero.el.2.

c) L.iubemus.§.pen. C. ad Trebel.& ibi Paul. de Caſtr.

15 When † the childe *dieth ſo ſoone as it is borne*, we muſt conſider whether it were borne in due time or not: if it were borne in due time, ſo that

by possibilitie of nature it might haue liued longer (as in the vii. ix. or x. moneth [d]) the father is iudged to haue issue, especially † if the childe were once heard to crie [e] : for then also by the lawes of this realme, that man whose wife was seased in fee simple, or in fee taile generall, or as heire in fee taile speciall, shal be said to haue had issue, and by reason thereof after the decease of his wife, shall holde the same land during his life, and shall be called tenant by the curtesie of England, for that it is thought, that the same law is not vsed in any other Countrey, sauing onely in England [f]. But † if the childe which he had by his wife were not heard to crie, it is thought that he cannot be tenãt by the curtesie [g]. Which opinion, though auncient, hath beene strongly encountered of late, and shrewdly shaken by men of deepe iudgement, and reuerent auctoritie [*]; and so the same not being free from contradiction, cannot bee vtterly voide of doubt: and therefore, (as it becommeth me) I doo verie willingly referre the determination thereof, to the lerned and expert in the studie and practise of the lawes temporall of this land. Neuertheless, to other purposes and testamentarie effectes determinable in the ecclesiasticall courts, I suppose he shall not bee reputed to haue died without issue, although his childe did neuer crie, so that it did sensible breath or moue [h]; for what if the childe were borne dumbe [i]. Therefore I say by the ciuill and ecclesiasticall lawes, concerning testamentarie effectes, the father shall not bee accounted to haue died without

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d) L. septimo mense. de stat. hom. L. Gallus. in princ. de lib. & posthu. L. intestat. §. vlt. de suis & legit. ff.

e) Mantic. de coniect. vlt. vol. lib. 11. tit. 6. n. 10. Mascard. Tract. de probac. verb. Natus. concl. 1088. n. 9. & 10. per L. quod certatum. C. de posthu. hæred. instituend. & Sichard. in d. L. n. 4.

f) Litleton. tit. curtesie d'engleterr.

g) Bract. de leg. & consuet. Angl. lib. 5. tit. de excep. c. 30. n. 7. & 8.

*) Dyer. fol. 25. n. 159. post Fitzh.

h) L. quod dicitur. ff. de lib. & posthu. L. 2. & 3. C. de posthu. Felin. in c. sicut. de homicid. extr. Mascard. Tract. de probac. verb. natus. concluf. 1088. sub finẽ.

i) d. L. quod dicitur. & d. L. 2. & 3. & DD. ibid.

issue,

Issue, if the childe did but breath, and though it did not, nor coulde not crie, but died in the handes of the midwife [k], for crying is not an onely proofe of life [l], since it may be prooued by other meanes, as by motiõ, breathing, and such
18 like [m]. In deede † if the childe be borne deade [n], or being halfe borne aliue, yet dieth before it be wholy borne [o], hee shall not bee reputed to haue issue [p]. Likewise in the other case, that is to say, when the child is not brought forth in due time, as (perhappes before the seuenth moneth, or in the eight moneth) so that it is impossible for the same to liue: the parents for and concerning testamentarie effectes, shal not be accompted thereby to haue had issue, howsoeuer the childe for a while after the birth did sensiblie breathe and moue [q].

19 If † the testator make thee his executor, or do bequeath vnto thee any legacie conditionally, if he shall haue no issue, and afterwards his wife doe bring foorth a monster, or misshapen creature, hauing peraduenture a heade like vnto a dogges heade, or to the head of an asse, or of a Rauen, or Ducke, or of some other beast, or birde: such monstrous creature, though it should liue (as commonly none doo) yet is it not accounted amongst the testators children [r], for the lawe doth not presume that creature to haue the soule of a man, which hath a forme and shape so straunge and different from the shape of a man [s]. But if the creature brought forth, do not varie in shape from a man or woman, but haue somewhat more then God by

k) d. L. 3. C. de posthu.
l) L. quod certatum. C. de posthu. & ibi Sichar.
n. 4. Mascard. de probac. conclus. 1088. n. 10.
m) L. si magister. C. de Instit. & sub. Mascard. d. concl. 1088. sub fine. Sichard. in d. L. quod certatum.
n) L. qui mortui. ff. de verb. signif.
o) Alciat. in d. L. qui mortui. Cui adde Tiraquel. in rep. L. si vnquam. C. de reuoc. donac. verb. susceperit. n. 132. vbi etiam disputat an talis baptizari possit, cuius tantum caput in partu apparet.
p) d. L. 3. in fin. d. L. qui mortui. & DD. in LL.
q) L. 2. C. de posthu. Socin. sen. cons. 275. n. 20. vol. 2. Mantic. de coniect. vlt. vol. lib. 11. tit. 6. n. 10. Graff. Thesaur. com. op. §. fideicommissum. q. 33. in fin.
r) L. non sunt. ff. de stat. hom. Olden. in eand. L. & Sichard. in d. L. 3. C. de posthu.
s) Bald. in d. L. nõ sunt. Sichard. in d. L. 3. n. 5.

the ordinarie course of nature alloweth, as hauing sixe fingers on either hand[t], or on the contrarie, wanting some of the ordinarie members, as hauing but one hande, or one foote[u]: such creature is not excluded, but is to be accounted for the testators childe. What if there be duplication of notable members, as to haue foure armes, or two heades, or disorder in the principall members, as the face standing backwardes, or in the breast? In this case I suppose much to bee attributed to the discretion of the Iudge[x]. And albeit the writers seeme rather to encline to this opinion, that they be monsters, & so not to be accounted as childrē[y]: notwithstanding, if any legacie bee left, not by the parents to another, but to the parents by another, vpon cōditiō, if they shal haue issue: in this case it seemeth that it doth not hinder the parents, though the father did beget, and the mother bring foorth a monster, when it cannot bee imputed to their fault, wherefore the issue was monstrous[z].

If † the testator make the childe in the mothers wombe his executor, & the mother bring forth two or three children at that brith, whether are they al to be admitted executors? Likewise † the testator bequeathing to the childe in the mothers wombe, if it bee a man childe, a greater summe, if a woman childe, then a lesser summe: the mother bringing forth both a sonne and a daughter at one burthen, howe much is to either? These questions are elsewhere absolued[a].

t) DD. in d. L. 3. C. de posthu. & in d. L. non sunt. & in L. ostentum. & in L. quæret. ff. de verb. sig. Idem quoque iuris est si quis habeat tres testes. Alciat. in d L. quæret. n. 9.

u) Bald. & Aug. in L. quod dicitur. ff. de lib. & posthu.

x) Sichard. in d. L. 3. C. de postu. n. 5. verb. cum autem.

y) L. ostentum. ff. de verb. signif. DD. in d. L. quod dicitur.

z) d. L. quæret. de verb. signif. & Alciat. ac Rebuff. ibid.

a) Inf. ead. parte §. 20. sub finem.

What

What order is to bee taken concerning the adminiſtration of the goodes of the deceaſed, whiles the condition of the executorſhip dependeth vnaccompliſhed.

1 *Of the remedie which creditors and legataries haue during the ſuſpence of the condition of the executorſhip.*
2 *The firſt remedie, is to commit the adminiſtration to him that is conditionally aſsigned executor.*
3 *The effect of this adminiſtration.*
4 *What if the executor will not meddle with the adminiſtration or poſſeſsion of the goods in the meane time.*

§. xvj.

1 Oraſmuch † as the nature of euerie honeſt and poſſible condition is ſuch, as it dooth ſuſpende the execution and effect of the diſpoſition [a], ſo that in the meane time the partie deceaſed cannot be iudged to haue died either teſtate, or inteſtate; and cõſequently he that is made executor, is neither to be receiued nor repelled in the meane time to or from the executorſhippe [b]: It ſhall not be amiſſe to ſhew what order is to be taken, for and concerning the poſſeſſion and adminiſtration of the goodes of the deceaſed, and what remedie the creditors and legataries haue, for the obtei-

a) L. qui hæredi. de cond. & demon. L. ſi quis ſub conditione. Si quis omiſſa cauſa teſta. L. cedere diem. de verb. ſig. ff. Graſſ. Theſaur. com. op. §. legatũ. q. 52. & ſupr. ead part. § 6.

b) L. quamdiu. ff. de acquir. hæred. Minſin. in § hæres. Inſtit. de hæred. inſtituend.

ning of their debts and legacies, which are due presently after the death of the testator, whiles the condition of the executorship dependeth[c]: For it seemeth not onely inconuenient, but vniust also, that they, especially the creditors[d], should be remedilesse all that while, during the suspence or expectation of the performance of the condition, vntil that bee performed by the executor, which perhaps would not, nor could not be effected in seuen yeares.

c) Quod autem iure ciuili non possunt legata peti pendente cõditione institutionis, vt in qua tota vis testamẽti collocata sit, non obseruatur in Anglia, vt alias pleniùs diximus, infra part. 6.

d) Creditores enim de damno vitando: Legatarij autem de lucro captando certare dignoscuntur. L. scimus. §. & si præfatum. C. de iure delib.

The first † remedie therefor is this, consi- 2
dering that hee which maketh an executor conditionally, cannot be iudged to haue died intestate, the condition depending, or so long as the testament may take effect[e]: and so the administration of the goodes cannot be committed according to the statutes of this Realme, which prouide onely in that case, where a man dieth intestate, or where the executor dooth refuse to prooue the testament[f]. It is prouided by the ciuill & ecclesiastical lawes, that it shall bee lawfull for the Ordinarie, to commit the administration and possession of the goodes of the deceased, to him that is made executor, onelie for and during so long time as the condition dependeth, and is not extant, or else deficient[g]: By † vertue of which administration, or decree 3
of possession, the said executor may enter to the said goods, and may administer and sel the same for the satisfiyng of the debts due by the testator, and payment of his legacies simply bequeathed, and may bee conuented by them, if hee make delaies during the time aforesaide[h]: And

e) d. L. quã diu. ff. de acquir. hæred.

f) Stat. H. 8. an. 21. c. 5. & stat. Ed. 3 an. 32. c. 11.

g) L. si quis instituatur. §. 1. & §. 2. ff. de hæred. instituend.

h) d. L. si quis. Quæ lex etsi creditoribus tantũ prębeat remedium, tamen iure quo vtimur, legatarijs quoque succurritur, vtpote quibus legata omnino debeantur, etiamsi deficiat institutionis conditio. nec aliquis existat hæres, seu executor (infr. part. 7. §. 19.) nedum vbi pendeat adhuc conditio.

if

if afterwards the condition bee performed or extant, then may hee still retaine the goodes of the deceased, as executor to the will[i]: But if the cõdition be infringed or deficient, then ought he to make restitution to the next of kinne to the deceased, or to those that shall haue administration of his goodes[k]: For by breach or defect of the condition, the deceased is reputed to haue died intestate, or as hee had neuer made executor[l], and the former administration is finished, and a new may be committed[m].

4 If he † that is made executor conditionally, will not meddle with the administration of the goodes of the deceased, ne yet performe the condition, the next remedie is this: you must consider the nature of the condition, that is to say, whether the performance of the same doo consist in the power of the executor or not[n]: If it bee such a condition as hee may easily performe, then may the ordinarie assigne vnto him a competent tearme, for the accomplishment thereof[o]; within which time, if the executor doo not performe the same, it is reputed for infringed or deficient[p]; and so the administration may bee committed according to the statute, in this case, as of one dying intestate[q]: And the executor shall bee excluded, if he doo not purge his delay, before the administrators doo meddle with the goods[r]. If the condition consist not in the power of the executor, then may the ordinarie at the petition of the creditors, appoint a time to the executor to vndertake the administratiõ & possessiõ of the goods, during

i) Dum tamen probatũ sit testamentum, & ab Ordinario approbatũ.

k) L. 2. § si sub conditione. ff. de bon. poss. secundum Tabul. Grass. Thesaur. com. op. §. bon. poss q. 5. n. 7.

l) L. hæres. de acquir. hæred. L. quod dicitur. de mil. test. ff.

m) d. L. si quis institutus. ff. de hæred. instit.

n) d. L. si quis, §. 1. & 2.

o) Fortasse 100. dies extraneis, & annum defuncti liberis, secundum Bar. & Bald. in d. §. 1.

p) Bar. & Paul. de Castr. in d. §. 1.

q) Stat. H. 8. an. 21. c. 5.

r) Bald. & alij in d. §. 1.

s) d. §. 1. & DD. ibid.

during which time, if he refuſe or neglect to vndertake the ſame adminiſtration; then may the ordinarie commit the ſame to ſuch as haue intereſt, vntill ſuch time as the condition bee either extant or deficient[s].

s) d. §. 1. & DD. ibid.

Of the making of an executor, to or from a certaine time.

1 *An executor may be ordeined, either for a time, or from a time.*

2 *The Ordinarie may commit adminiſtration vntill there be an executor, or after the executorſhippe is ended.*

3 *Whether a man may die partlie teſtate, and partly inteſtate.*

4 *Whether he is ſaide to die partly teſtate, and partly inteſtate, which appointeth an executor, to or from an vncertaine time.*

5 *A legacie may be giuen to or from a certaine time, or to or from an vncertaine time.*

6 *That legacie is not tranſmiſsible, which is giuen from an vncertaine time.*

7 *What if the vncertaintie be not about the queſtion* whether, *but about the queſtion* when?

8 *What if the vncertaintie be not ioined to the ſubſtance of the legacie, but to the execution.*

9 *The legacie is not tranſmiſsible, when the queſtion is onelie* when, *not* whether.

10 *The teſtator may make that tranſmiſsible, which otherwiſe is not tranſmiſsible.*

11 *Whether that legacie be tranſmiſsible, which is giuen after a certaine age.*

12 *Difference*

12 *Difference whether the legacie bee ioined to the ſubſtance, or to the execution of the diſpoſition.*

13 *Certaine caſes wherein a legacie is tranſmiſſible, albeit the age bee ioined to the ſubſtaunce of the legacie.*

§. xvij.

1 ALbeit † by the ciuill lawe *Hæres* the heire cannot bee inſtituted, either from a certaine time, or vntill a certain time[a], leaſt the deceaſed might ſeeme to die, partly teſtate, & partly inteſtate[b]: yet where an executor is ordeined, howſoeuer the executor bee, *quaſi hæres*[c]; at leaſt by the lawes of this realme, hee may bee appointed either from a certaine time, or vntill a certaine time[d]: For example, the teſtator maketh thee his executor after the expiration of fiue yeares next after his death, or he dooth make thee his executor, for and during fiue yeares next after his death: This aſſignation is
2 lawfull by the lawes of this realme[e]. And the † Ordinary may commit the adminiſtratiõ of the goodes of the deceaſed to the next of kinne in the meane time, during which time, the act of the adminiſtrator is good, and cannot bee auoided by the executor afterwards[f]; for in the mean time he dieth inteſtate: And likewiſe he maie commit the adminiſtration of the goodes of the deceaſed vnadminiſtred by thee, after the expiration of the time of thy executorſhip, where thou art appointed executor but for a time.

a) L. hæreditas. ff. de hæred. inſtituend. §. hæres inſtit. eod. tit.

b) Llus noſtrum. de reg. iur. ff. cuius regulæ rationem aſſignat Porcius in §. & vnũ Inſt. de hær. inſtituend.

c) Supr. 1. part. §. 3. n. 19. Haddon. de reform. leg. eccleſiaſt. Ang. Doct. & Stud. lib. 2. c. 11. Tract. de repub. Ang. li. 3. c. 19

d) Brook Abridg. tit. exec. n. 155. tit. adminiſtr. n. 45. Plowd. in caſu inter Greisbr. & Fox.

e) Brook vbi ſupra.

f) Plowd. in caſu inter Greysb. & Fox.

For

For after the tearme be expired, he is ſaid to be inteſtate [g].

Where † it is ſaide that a man cannot die 3
partly teſtate, and partly inteſtate, that is true where the ſtrictneſſe of the ciuill lawe is obſerued [h]: But where the teſtator is not tied to ſuch ſtrict obſeruance, whether it be by reaſon of legall priuiledge, as in *militarie teſtaments* [i], and in teſtaments *ad pias cauſas* [k], or whether it be by cuſtome of the place [l], where the teſtator abideth [l], as in England, where we inioy all immunitie, nor bee tied to any other obſeruance in makinge of teſtaments, then that which is *iuris gentium* [m], in theſe caſes and places, a man may die partly teſtate, and partly inteſtate [n].

If the † teſtator doo ordeine, or make an 4
executor, from or vntill an vncertaine time, as from or vntill the death or marriage of his ſonne: this aſſignation is good and ſufficient, euen by the ciuill law [o], neither is the teſtator in this caſe ſaide to die partly teſtate, and partly inteſtate [p]: for an vncertaine time is compared to a condition [q], which if it come to paſſe, and be extāt, the teſtator is reputed to haue died wholy teſtate [r]: for a condition purified hath reference back ward, & is vnderſtood, as if it had bene accompliſhed immediately vpon the death of the teſtator [s], neither can the teſtator be ſaide to die inteſtate in the meane time before the euent, or whiles the condition dependeth in expectation [t]: But if the condition be infringed, or become deficient, then is the teſtator to be adiudged to haue died alwaies inteſtate, and not from

g) Brook. Abrid. tit. adminiſt. n. 1. & n. 45.
h) Dec. Cagnol. & Hyero. Franc. in d. L. ius noſtrum. de reg. iur. ff.
i) L. miles. ff. de mil. teſtō. Cagnol. & Dec. in d. L. ius noſtrum.
k) Bar. in L. 1. C. de ſacroſan. eccle. Hyero. Franc. in d. L. ius noſtrum. in fin.
l) Hyero. Franc. in d. L. ius noſtrum.
m) Supr. 1. part. §. 10, in prin. Tract. de repub. Angl. lib. 3. c. 7.
n) Brook & Plowd. vbi ſupr. adde Socin. Tract. reg. & fal. reg. 400. vbi tradidit 20. caſus, in quibus poteſt quis decedere pro parte teſtatus, pro parte inteſtat.
o) L. in tempus. ff. de hæred. inſtit. L. extraneum eod. tit. C. gloſſ. in §. hæres. Inſtit. de hæred. inſtituēd. Graſſ. Theſaur. com. op. §. Inſtitutio. q. 24. n. 4.
p) Hyero. Franc. in d. L. ius noſtrum.
q) L. dies incertus. ff. de cond. & demon. Iaſ. in L. ſi cui legetur. de leg. 1. n. 6. Cuiac. obſeruac. lib. 18. c. 1.
r) L. hęres quandocūq; de acquir. hæred. Hyer. Franc. in d. L. ius noſtrum. de reg. iur. ff.
s) L. quod dicitur. de mil. teſtō. L. hæres quādocunque. de acquir. hæred. ff. Minſing. in §. hæres. Inſtit. de hæred. inſtituend. Tiraquel. de retract. §. 1 gloſſ. 2. n. 27. (t) Minſing. in d. §. hæres. n. 4.

the

the time of the breach, or defect of the conditiō [v], which is the cauſe wherefore in condicionall aſſignations, the adminiſtration cannot be cōmitted to the next of kinne, as in caſe of one dying inteſtate, ſo long as the condition is in ſuſpence, as hath bene before declared.

5 And here † note, that as an executor may be appointed from a certaine time, or vntill a certaine time: ſo a legacie may bee bequeathed either from a certaine time, or vntill a certaine
6 time [x]. And albeit where † a legacie is giuen from or after a certaine time, the legatarie dying in the meane while, before the time bee come, the executors or adminiſtrators of that legatarie may demaund and recouer the legacie, after the day be paſt, as might the legatarie himſelfe if he had liued [y]: vnleſſe the meaning of the teſtator be contrarie [z], or vnleſſe it be ſuch a thing as cannot be trāſmitted to the executor, as perſonall ſeruice [a]: Yet † if the legacie be giuen af-
7 ter an vncertaine time (for ſo alſo it is lawful for the teſtator to doe [b]) the legatarie dying in the mean while, the executors or adminiſtrators of the legatarie deceaſed cannot demaunde the
8 ſame, but are vtterly excluded [c]: and that † not onely when it is vncertaine, *whether* it ſhall happen [d], but alſo when it is vncertaine *when* it ſhall happen [e]: for example, the teſtator giueth thee an hundred pound when his daughter ſhall be maried. This is vncertaine whether [f] it ſhall happen at all or no: or the teſtator giueth thee an hundred pounde when his ſonne ſhall die. This is vncertaine when [g] it ſhall happen,

v) Hyero. Franc. in d. L. ius noſtrum. de reg. iur. ff.

x) Graſſ. Theſaur. com. op. §. legatum. q. 43.

y) L. 5. ff. quando dies. leg. ced. Graſſ. d. q. 43. Vaſq. de ſucceſſ. progreſſ. lib. 3. §. 29. n. 2.

z) L. in conditionibus. de cond. & demon. ff. Mantic. de coniect. vlt. vol. lib. 11. tit. 20. n. 8

a) L. ſi poſt. in princ. ff. Quando dies. leg. ced. & ibi Bar.

b) Graſſ. d. q. 43.

c) d. L. ſi poſt diem. L. ſi Titio. ff. Quando dies. leg. ced. Graſſ. d. q. 43.

d) L. cum teſtator. C. de manumiſſ. teſt.

e) L. ſi Titio. ff. quando dies. leg. ced L. ſi cui. §. 1. de leg. Graſſ. d. q. 43.

f) Alex. conſil. 55 vol. 2.

g) Cuiac. obſeruac. lib. 18. c. 1 Vaſq. de ſucceſſ. pgreſſ. lib. 3. §. 27. n. 11. & §. 29. n. 3 in fin.

pen, not whether it ſhall happen, for it is certaine we muſt all die. In both which caſes, if thou die before the day be come, that is to ſay, before the marriage of the teſtators daughter, or death of his ſonne, the legacie is vtterly extinguiſhed, or as if it had beene conditionall[h]. Neither † is it material whether the vncertainty 8 be ioined to the *ſubſtance* of the diſpoſition, or to the *execution* thereof: for in both caſes the legacie or diſpoſition is reputed conditionall[i]: and ſo it is not materiall, whether the teſtator ſay, I giue to A.B. an hundred pounde when my daughter ſhall marrie, or when my ſonne ſhall die: In which caſe the vncertaintie is ſaide to be ioined to the verie ſubſtance of the diſpoſition: or whether the teſtator ſay, I giue to A. B. an hundred pounde, and I will that the ſame ſhall be paied when my daughter is maried, or my ſonne dieth[k]: In which caſe it is ſaide to be ioined to the execution of the diſpoſition[l]. For as well in the one caſe as in the other, if the legatarie die before the mariage of the teſtators daughter, or death of the teſtators ſonne his executors or adminiſtrators cannot demaunde the legacie[m].

But in verie truth (if we looke a litle neerer vnto the cauſe) the time of anothers death is not onely vncertaine, in reſpect of the queſtion *when*, but alſo in ſome reſpect of the queſtion *whether*[n]: for who is certaine whether that the other ſhal die before the legatarie? and this I ſuppoſe to be the principall cauſe, wherfore the legacie which is giuen, or is to bee performed after

h) L. ſi Titio. quãdo dies. leg. ced. L. quib' diebus. §. 2. de cond. & demon. ff. Bar. in L. ſi cui legetur. §. 1. de leg. 1. Vaſq. vbi ſupra.

i) Alex. in L. ſenis. ad Trebel. ff. Iaſ. poſt Bald. & Paul. de Caſtr. in d. L ſi cui. §. 1. de leg. 1. Graſſ. Theſaur. com. op. §. legatum. q. 43. Vaſq de ſucceſſ. progreſſ. lib. 3. §. 29. n. 4. quæ opinio ſcilicet quod legatum huiuſmodi nõ fit in diem, ſed conditionale, vbi dies eſt incertus. quando (veluti poſt mortem alterius) vt communior, ita & eſt verior, ex relatione Graſſ. §. legatum. q. 43. n. 8. cui ſubſcribit Mantic. de coniect. vlt. vol. lib. 11. tit. 20. n. 3.

k) DD. in L. ſi cui. §. 1. de leg. 1. ff.

l) Bar. Paul. de Caſtr. Lancel. Dec. in d. §. 1.

m) Vaſq. de ſucceſſ. progreſſ. lib. 3. §. 29. n. 4. Mantic. de coniect. vlt. vol. lib. 11. tit. 20. n. 3.

n) L. hæres meus. ff. de cond. & demon. & Bald. in d. L.

after the death of another, is reputed to be conditionall: namely, becauſe it is vncertaine whether that time ſhal happen during the life of the
9 legatarie[o]. For † if the queſtion be onely *when* the time ſhall happen, and not *whether* it maie happen during the life of the legatarie, then the legacie in reſpect of tranſmiſſion, is ſaid to bee pure and not conditionall[p]: As for example, the teſtator giueth thee an hundred pounde to be paied the day before thy death: heere the vncertaintie is onely when the time ſhall happen, not whether it ſhall happen during thy life: wherefore in this caſe, after thy death, thy executors or adminiſtrators may recouer the legacie[q], and that without diſtinction, whether the vncertaintie be ioined to the ſubſtaunce of the legacie; as I giue thee an hundred pounde the day before thy death; or whether it bee ioined to the execution of the legacie; as I giue thee an hundred pounde to be paied the day before thy death[r].

o) Bald. in d. L. hæres. Cuiac. lib. 18. obſeruac. cap. 1. Mantic. de cõiec. vlt. vol. lib. 11. tit. 20. n. 4

p) d. L. hæres meus. & ibi Bald. cum Paul. de Caſtr.

q) d. L. hæres meus. L. 4. ff. quando dies. leg. ced.

r) d. L. hæres. Et licet in illius legis exemplo incertitudo videri poſſit adiungi præſtationi legati, & non ſubſtantiæ, tamen cùm ratio illius legis ſit generalis, & in vtroque caſu militet, nempe quia dies non poteſt non cedere viuente legatario, vis legis non eſt per vnicum exemplum anguſtanda

Wherefore where it is ſaide, that when a legacie is giuen after an vncertaine time, if the legatarie die in the meane while, his executors or adminiſtrators are excluded from demaunding the ſame legacie, albeit the vncertaintie be about this queſtion *when*; that concluſion hath diuerſe limitations. The firſt limitation or reſtraint is, in caſe alſo it bee vncertaine whether the ſame ſhall happen during[s] the life time of the legatarie: otherwiſe, if it muſt needs happen during the life of the legatarie, then the executors or adminiſtrators of the legatarie are not

s) Bald. in d. L. hæres. Mantic. de coniect. vlt. vol. lib. 11. tit. 20. n. 4. Cuiac. lib. 18. obſeruac. c. 1. Iaſ. in L. ſi cui. §. hoc autem. de leg. 1. n. 7.

excluded, although it bee vncertaine when it shall happen[t]. Another limitation is, when † it is the meaning of the testator, that the executors or administrators of the legatatie shal haue the legacie, notwithstanding the death of the legatarie in the meane time, for then the vncertaintie of the time dooth not make the disposition conditional, becauſe the testator maie if he will, make that transmissible, which otherwise is vntransmissible[v]. 10

What † if the testator dooth bequeath some legacie, when the legatarie or some other person hath accomplished *a certaine age*, whether (if the legatarie, or that other person die before that age) may the executors, or administrators of the legatarie obteine the legacie[x]? This question I suppose is thus to be answered. 11

If † the time be ioined to the *substaunce* of the legacie, thē the executors or administrators of the legatary deceased before the accomplishment of that age, are without hope of obteining the legacie[y]: For example, the testator doth giue thee an hundred pounde, when thou shalt bee of the age of 21. yeares, thou diest before that time, thy executors or administrators cānot obteine the hundred pounde[z]: except in certaine cases, whereof the first † case is, when relation is made to the age of the executor, who is charged with the paimēt of the legacie, and not to the age of the legatarie, or of anie thirde person[a]: For example, the testator doth will or charge his executor to pay vnto thee an hundred pounde, when hee shall be of the age 12 13

of

t) d. L. hæres meus. ff. de cond. & demon.

v) L. in conditionibus. ff. de cond. & demon. Mantic. de coniect. vlt. vol. lib. 11. tit. 20. n. 8. Vasq. de succeſſ. progreſſ. lib. 3. c. 29. n. 15. 16

x) De hac q. vberrimè ſcripſit Vasq. de ſucceſſ. progreſſ. lib. 3. c. 29. & generaliter DD. in L. ſi cui. §. hoc autem. ff. de leg. 1.

y) L. ſi Titio ff. Quando dies. leg. ced. d. L. ſi cui. §. hoc autem. de leg. 1.

z) DD. in d. §. hoc autem.

a) Bar. in d. §. hoc autem.

of xxi. yeares, before which time the executor dieth. In this caſe (by the opinion of diuerſe[b]) thou maiſt recouer thy legacie againſt the executor of that executor dying at ſuch time, as the former executor, if he had liued, ſhould haue accompliſhed the age preſcribed in the teſtament: Their reaſon is, becauſe the teſtator is preſumed to beare greater loue to his owne executor, on whome hee hath beſtowed the reſidue of his goodes, then to the executors executor, whom peraduenture he did not knowe[c]: Wherefore ſeeing the teſtator charged his owne executor whom he more loued, the rather then is he preſumed to charge his executors executor whom he leſſe loued[d]. Howbeit if the teſtator charge his executor with the paiment of the legacie by this worde *if*, as if the teſtator commaunde his executor to pay vnto thee an hundred pounde, if hee ſhall accompliſh the age of xxi. yeares: Here the legacie is condicionall, and therefore if the executor die in the meane while, the legacie dieth together with the executor[e]. And ſo it is if the executor bee charged with the paiment of the legacie after he bee of ſuch age[f]: Nay more (contrarie to that which is ſaide before) although the teſtator do charge his executor with the paiment of the legacie by this worde *when*, as in the firſt example; euen there alſo by the receiued opinion of the more parte, the legacie is concluded to be condicionall[g]: and therefore if the executor die before that age, the legacie cannot bee recouered againſt the executor of the executor deceaſed[h], no

b) Par. Angel. Paul. de Caſtr. & Lancel. Dec. in d. §. hoc autem. per L. libertis quos. §. ab hæredibus. ff. de Alimen. & cibar. leg.

c) Bar. & Lancel. Dec. in d. §. hoc autem.

d) Arg. à maior. ad mi.

e) Bar. in d. §. hoc autē. per L. ſi ſeruus. ff. de ſtat. lib.

f) L. fideicommiſſaria. el. 1. §. etiam. ff. de fideicommiſſ. Lib. & Bar. cum Paul. de Caſtr. & Lancel. Dec. in d. §. hoc autem. ff. de leg. 1.

g) Dyn. Sal. Imol. Raph. Cuma. Alex. Aret. & Iaſ. in d. §. hoc autem. quorum opinio communis eſt contra Bar. & eius ſequaces, ait Iaſ. vbi ſupra.

h) L. intercidit. ff. de cō. & demon. ff. L. vnic. §. ſin autem. C. de cad. tol.

no more then where it is giuen *after* his executor haue accompliſhed ſuch an age, for albeit this worde (*after*) doth import a more full perfection of time then dooth this worde *when*[i], yet they differ not in making the diſpoſition conditionall: for that is done as well by the worde *when*, as by the worde *after*[k]. What if the executor being charged with the paiment of the legacie, when, or after hee haue accompliſhed a certaine age, the legatarie himſelfe doo die, the executor ſtill liuing, whether may the executors or adminiſtrators of the legatarie deceaſed recouer the thing bequeathed of the executor then liuing, after he haue accompliſhed the age limited in the teſtament? It ſeemeth that he may[l], becauſe the condition is heere extant: notwithſtanding becauſe it is concluded, that the legacie in this caſe is condicional, therfore howſoeuer the condition doo afterwards còme to paſſe, yet was the legacie extinguiſhed by the death of the legatarie, the condition then depending[m], and ſo cannot be recouered by his executors or adminiſtrators, vnleſſe it be proued (for it is not preſumed[n]) that the teſtator did meane the contrarie[o].

The ſecond caſe is in fauour of libertie or freedome from bondage[p]: For example; the teſtator doth manumit his villeine, when his ſon ſhall attaine to the age of xxi. yeeres. In which caſe albeit his ſonne do not attaine to that age, yet ſhall the villeine be free, at ſuch time as hee ſhould haue attained vnto that age, if he had liued[q].

The

i) Iaſ. Alex. & alij. in d. §. hoc autem.

k) Ita contra Bar. ſentiunt Salic. Imol. Alex. & Iaſ. ac Moder. in d. §. hoc autem.

l) Paul. de Caſtr. in d. §. hoc autem. in lect. pad. verſ. & multo fortius.

m) L. vnic. §. ſin autem. C. de cad. tol. L. interdit. ff. de cond. & demõ.

n) Nam cùm præſumitur teſtator magis diligere ipſum legatarium quàm eius executorem, licet velit dare primo, non ſequitur quòd dabit ſecundo. Bar. in d. §. hoc autem.

o) L. in conditionibus. ff. de cond. et demon. Mantic. de conject. vlt. vol. lib. 11. tit. 20. n. 8. Bar. in d. §. hoc autem. in fin.

p) L. ſi ita ſcriptum. ff. de manumiſſ. teſta.

q) d. L. ſi ita ſcriptum. & DD. in d. §. hoc autem.

The thirde caſe is, when anie legacie is left to ſome godlie vſe, for then alſo the legacie may be recouered, notwithſtãding the death of that perſon, to whoſe age the teſtator made relation[r].

The fourth caſe is, when the time tendeth to the diſſolution of the legacie: For example, the teſtator dooth giue thee tenne pound yearly, vntill his ſonne doo attaine to the age of xxi. yeares: In which caſe, if his ſonne die in the meane time, thou maiſt obtaine the legacie of tenne pound yeerely, vntill ſuch time as the teſtators ſonne ſhould haue attained to that age, if he had liued[s].

The fift caſe is, when it is the will and meaning of the teſtator, that the legacie ſhould be tranſmitted[t].

But if the time of the age bee not ioined to the *ſubſtance* of the legacie, but to the *execution or performance* of the ſame: then the legatarie dying in the meane time, his executors or adminiſtrators may recouer the ſame when the time is expired, wherein the legatarie if he had liued, ſhould haue accompliſhed that age[v].

r) Vaſq. de ſucceſſ. progreſſ. lib. 3. § 29. n. 5. in fin. vbi concluſionem hanc variis confirmat medijs.

s) L. ambiguitatem. C. de vſufruct. Bald. in d. L ſi cui. ff. de leg. 1. Vaſq. de ſucceſſ. pgreſſ. lib. 3. § 29. n. 3.

t) Bar. in d. L. ſi cui. §. hoc autem. in fin. Bald. in eand. L. et in L. Scius. ad Trebel. ff. Paul. de Caſtr. in d. L. ambiguitatem. n. 2.

v) Bar. et alij, in d. §. hoc autem. p L. ex his C. quãdo dies. leg. ced.

Of making an executor vniuerſallie or particularlie.

1 *It is lawfull to appoint an executor either vniuerſally or particularly.*

2 *The vniuerſall executor maie enter to all the teſtators goodes and cattels, and therefore chargeable with paiment of all his debts.*

3 *The particular executor maie meddle with no more then is allotted vnto him, and therefore not charged but according to his portion.*

4 *A man may die both testate and intestate, in respect of his goodes.*

5 *Of a particular and vniuersall legatarie.*

§.xviij.

THirdly †, an executor may bee ordeined either vniuersally or particularly[a]: vniuersally, that is to say, when the testator maketh an executor of his whole will, or dooth commit vnto him the distribution of all his goodes: or when the testator dooth appoint an executor indifferently, that is to say, without any signe vniuersall of *whole* or *all*: as I make A. B. my executor[b]: particularly, that is to say, when the testator dooth commit the execution of some part of his wil, or the disposing of some part of his goods onely; as if the testator should make thee his executor of his plate, or of his goodes within the Countie of Yorke, or of his debts onely[c]. 1

He † that is made executor vniuersally or simplie may enter to all and singular the goods and cattels of the testator[d], and in that respect is vniuersally and simplie chargeable, with the paiment of all and singular the debts and legacies of the testator, so far as the same goods and cattels do extend[e]. 2

He † that is made executor particularly, cānot meddle 3

a) §. hæreditas. Instit. de hær. instit. Graff. Thesaur. com. op. §. Institutio. q. 21. n. 1. Fitzh. Abridg. tit. executor. n. 26. Brook. tit. execut. n. 2. & n. 155.

b) L. 3. C. de mil. testō.

c) Fitzherb. Abridg. tit. exec. n. 26. Brook. eod. tit. n. 2. & n. 155.

d) L. hæreditas. de reg. iur. ff. & ibi Cagnol. Plowd. in cas. inter Greysbrook & Fox. & infr. part. 6. § 3.

e) Termes of law. verb. executor.

meddle with any other of the teſtators goods and cattels, then ſuch whereof he is made executor, and is onely ſo farre chargeable with the paiment of the debts and legacies of the teſtators, as the portion of the goodes to him allotted doth extend vnto[f]: and if there be no other executor appointed, the particular executor cannot meddle with the reſidue as executor: for
4 touching † the other goods, the teſtator by the lawes of this realme, is ſaide to die inteſtate[g], & ſo may die partly teſtate, and partly inteſtate, not onely in reſpect of time (as hath beene before declared[h]) but alſo in reſpect of place, and of goodes[i], contrarie to the ciuill lawe.

5 And heere note † that as an executor maie be made vniuerſallie or particularlie; euen ſo one may be made particular or vniuerſall legatarie, in reſpect of ſome vniuerſall or particular legacie left by the teſtator[k].

Howbeit, where the teſtator doth leaue all his goodes, or the reſidue of his goods to ſome perſon, none elſe being appointed executor, he to whom ſuch general legacie is made, ſeemeth to be appointed executor[l], at leaſt he hath bene admitted to the adminiſtration of the goods of the deceaſed[m], as heretofore more largely[n]. But if the teſtator giue his goods to one perſon, and make another executor: this executor is called *Nude* executor, for that he reapeth no commoditie by the teſtament[o].

f) Fitzh. & Brook vbi ſupra L. ſi hæredes. de leg. 1. L. legatorum. de leg. 2. ff. Sichard. in L. 1. C. de impub. & al. ſub. n. 4. Eſt enim eadē ratio partis ad partem, atque totius ad totum.

g) Fitzherb. & Brook in locis ſupraſcriptis.

h) Supra ead. part. §. 17. in prin. Brook tit. adminiſtrator. n. 45. Plow. in caſ. inter Greysb. & Fox.

i) Fitzh. tit. executor. n. 26. Brook eod. tit. n. 155.

k) Vide ſupr. 3. part. §. 17. & hac parte §. 4.

l) L. his verbis. ff. de hæredibus inſtit. & gloſſ. ac DD. ibid. Graſſ. Theſaur. com. op. §. Inſtitutio. q. 14. Mantic. de coniect. vlt. vol. lib. 4. tit. 3. n. 8.

m) Et ita ſæpiſſ. practicari, obſeruaui in foro Archiepiſcopi Ebor.

n) Supra ead. part. §. 4.

o) Io. de Athō. in legat. libertatem. de execut. teſtament. Lindw. in c. ſtatutum. de teſta. lib. 3. prouinc. conſtit. Cant. & in c. religioſa. eod. tit. verb. de damnis.

Of making executors by degrees.

1 *How executors are made by degrees.*
2 *He that is made executor in the first degree, is said to be instituted, the rest substituted.*
3 *Diuerse kinds of substitutions, whereof certaine haue but little vse in England.*
4 *Of the diuerse formes of a vulgar substitution.*
5 *Of the effects of substitutions.*
6 *So long as the executor instituted in the first degree maie bee executor, the substitute is not to bee admitted.*
7 *If any one executor in the first degree may be admitted, the substitute is excluded.*
8 *What if euerie executor haue a seuerall substitute.*
9 *The first substitute being repelled, whether the rest be repelled likewise.*
10 *What if the executor in the first degree die inteſtate.*
11 *The admission of the executor instituted in the first degree, doth not alwaies exclude the substitute.*
12 *The substitute ought to succeede in that part and quantitie, which was assigned to the former executor.*
13 *Where diuerse be substituted to one, whether they shall succeed equally or vnequally.*
14 *Diuerse cases wherein the executors being vnequally instituted, and the same also substituted, doo succeede equally.*
15 *Of the great difference betweene substituting by proper names, and substituting by names appellatiue.*

latiue.

16 *What if the ſubſtitution be made by both names.*

17 *What if ſome be inſtituted by their proper names, others not.*

18 *What if it bee doubtfull by what names they bee ſubſtituted.*

§. xix.

FOurthly, an executor may be made either in the firſt degree, or in the ſeconde degree, or in the thirde, fourth, &c.

a) L. poteſt quis. ff. de vulg. pup. ſub. Inſtit. de vulg. ſub. in princ. Fran. poſt gloſſ. in c. vlt. de teſta. 6. Brook tit. execut. n. 9.

1 The † teſtator is ſaide to make degrees of executors, whē he doth ſubſtitut one in place of another: For example, the teſtator maketh his wife executrix, & if ſhe wil not, or cannot be executrix, he maketh his ſonne executor; and if his ſonne be not executor, he maketh his brother executor[b]. In which examplē there be three degrees, whereof the wife is in the firſt degree, the ſonne in the ſecond degree, and the brother in the thirde degree: For looke how manie ſubſtitutions there bee ſuccedinge one another: ſo many degrees there bee beſides the principall inſtitution, which maketh the

b) d. L. poteſt. & ibi DD Graſſ. Theſaur. com. op. §. ſubſtitutio. q. 1.

2 firſt degree[c]: and who † ſo is executor in the firſt degree[c], he is ſaide to be inſtituted, and they which are executors in the ſecond, thirde, and fourth degrees, are ſaid to be ſubſtituted[d].

c) L. 1. L. poteſt. ff. de vulg. & pupil. ſub.

d) Zaſ. Tract. de ſubſtit. in princ.

3 There † bee diuers kindes of ſubſtitutions or ſortes of placing of executors one after another[e]; whereof either becauſe we haue no vſe at

e) Vt ſubſtitutio vulgaris, pupillaris, exemplaris, breuiloqua, cōpendioſa, de quibus figillatim & copioſè Zaſ. in ſuo pręclaro Tractatu de ſubſtitutionibus.

all[f] here in England, or verie little[g]; I ſhall onely ſpeake of that vulgar or common kind of ſubſtitution, whereof there is more vſe. Concerning the which this is to bee noted, that it † is 4
lawfull for the teſtator to make ſo many degrees of executors as he liſt[h], and he may ſubſtitute into the place of one executor, either one or more; and into the place of manie executors, he may ſubſtitute one alone[i]: likewiſe he may ſubſtitute or ordaine many executors, and appoint to euery of them a ſeuerall ſubſtitute; or he may ſubſtitute one of the ſame executors to another[k]: or the teſtator hauing inſtituted diuers executos, may ſubſtitute executors to ſome of them, but not to others[l].

It is alſo lawfull for the teſtator to inſtitute an executor ſimplie, and to ſubſtitute another in his place conditionally[m]; or contrarie wiſe, to inſtitute conditionally, and to ſubſtitute ſimplie[n]: Simplie, I ſay, not becauſe I denie any ſubſtitution to be conditionall; for in deede euerie ſubſtitution is in this reſpect conditionall, becauſe euerie ſubſtitute is appointed with this condition, viz. If the perſon to whom he is ſubſtituted, wil not or cannot be executor[o]: But I ſaie ſimplie, when no other condition is expreſſed or vnderſtoode in the ſubſtitution, then is expreſſed or vnderſtoode in the inſtitution[p].

Very † many and infinite almoſt, are the diuers effects iſſuing from the diuers kindes of ſubſtitutions[q], the diſcourſe whereof woulde be much more laborious then commodious: 5
wherefore

f) Vt de pupillari ſubſt. & de exemplari quę pupillaris ſubſt. idcirco corruit, nempe ob defectū patriæ poteſtatis, ſine qua conſiſtere non poteſt (Inſtit. de pup. ſub. in princ) & conſequenter cadit exẽplaris ſubſtitutio, quum hæc ad pupillaris imitationem fieri dignoſcatur.

g) Vt de breuiloqua & compendioſa: quarum diſceptatione mirum in modū inuoluunt ſe DD. à quibus nihil ferè aliud quàm quod ad fatigationem ſtudioſorum, & ad obſcuritatē rei, quæ vel vltro perdifficilis eſt, capere valeas.

h) Inſtit. de vulg. ſub. in princ. L. poteſt. eod. tit. ff.

i) § plures. Inſtit. de vulg. ſub.

k) d § plures.

l) d. L. poteſt. & DD. in eand. L.

m) L. qui liberis. de vulg. ſub. ff.

n) L. ſub conditione. ff. de hæred. inſtituend.

o) Iaſ. in L. quamdiu. ff. de acquir. hæred. in princ. Sichard. in Rub. de impub. & al. ſub. C.

p) L. qui liberis. de vulg. ſub. ff.

q) De quib' Zaſi', Politus Fumeus, & alij, in ſuis Tract. de ſubſtituc.

wherefore leaſt I ſhould make long harueſt about little corne, I ſhall content my ſelfe with declaration of two concluſions, whereby wee may vnderſtand, when and how the vulgar ſubſtitute is to be receiued or repelled, to or from the executorſhip.

The firſt and principall concluſion is this,
6 ſo long † as he which is inſtituted executor in the firſt degree may be executor, the ſubſtitute or hee which is appointed executor in the ſecond degree, cannot be admitted to the executorſhip[r]: and likewiſe, ſo long as he may bee executor, which is aſſigned in the ſecond degree, he that is appointed in the third degree is excluded: So by the firſt, the ſecond is repelled, by the ſecond the third, by the thirde the fourth, &c[s].

r) L. quãdiu. de acquir. hæred. L. cum in teſtamento. de hæred. Inſt. ff. L. poſt aditam. C. de impub. & al. ſub Graſſ. Theſaur. com. op. §. ſub. q. 9.

s) d. L. quamdiu. Zaſ. in d. Tract. de ſub. c. 1. n. 5.

7 And if the † teſtator doo inſtitute diuers executors, ſubſtituting one or moe, ſo long as any one of them which was firſt inſtituted may be executor, the ſubſtitute is not to be admitted[t]; 8 vnleſſe † the teſtator doo appoint to euery executor firſt inſtituted, his ſeuerall ſubſtitute: for then any one of thoſe firſt inſtituted executors, not being able or refuſing to bee executor, his ſubſtitute is to be admitted with the other exe-
9 cutors firſt inſtituted[v]: Whereas † otherwiſe any one of the executors in the firſt degree lawfully vndertakinge the executorſhip, all the ſubſtitutes are excluded; not onely thoſe which are placed in the ſecond degree, but alſo thoſe which be placed in the third and fourth[x]. In ſo
10 much that † if the executor vndertaking the office

t) L. quidam de impub. & al. ſub. C. Zaſ. in d. Tract. de ſubſtit. c. 6. verſ. quinta concluſio. ſed conſulas Ripã. in L. 1. ff. vulg. ſub. n. 187. &c. qui de hac q. pluribus diſputat.

v) Zaſ. in d. Tract. de ſubſtit. c. 1. membro 5. conclu. 1. limitac. 3.

x) Bar. in L. 1. de vulg. & pup. ſub. ff. n. 47. & Ripa. ibid n. 185. Dec. in L. poſt aditam. C. de impub. & al. ſub. n. 2.

fice, doo afterwards die inteſtate, yet the executors inſtituted do ſtil remaine excluded[y], & ſo by the lawes of this realme, the adminiſtratiō is to be committed of the reſt of the goods of the teſtator deceaſed not adminiſtred by the executor[z]: the reaſon is, for that they which are ſubſtituted are made executors conditionally; that is to ſay, if hee which is inſtituted executor in the firſt degree, will not, nor cannot be executor[a]: wherefore he that was firſt inſtituted lawfully, vndertaking the executorſhip, can not be ſaide to be vnwilling or vnable; and ſo the condition expireth, and is become deficient, without the accompliſhment whereof, that is to ſay, vnleſſe the executor in the firſt degree will not or cānot be executor, the ſubſtitute cānot claim any thing[b]. Howbeit, if † the executor inſtituted in the firſt degree, be depriued of the executorſhip, by reaſon of his negligence in not performing the will, then is the ſubſtitute to be admitted[c]: likewiſe, if the executor firſt inſtituted, notwithſtanding his intermedling, be admitted to renounce the executorſhip, then alſo the ſubſtitute is to be receiued[d]: likewiſe if hee that is firſt inſtituted, doo delay to take vppon him the executorſhip, by the ſpace of thirtie yeares, hee is to be excluded, and the ſubſtitute to be receiued[e]: but I ſuppoſe he is not to be excluded by lapſe of leſſer time, vnleſſe the ordinarie doo aſſigne a certaine time, to take or refuſe the executorſhip[f]: likewiſe, if he that is firſt inſtituted cannot bee executor, the ſubſtitute being appointed vpon this condition, if the former *will not* be executor, neuertheleſſe the ſubſtitute is

11

to

y) L. poſt aditam. C. de impub. & ali. ſub. & Sichard. in eand. L. n. 1. verſ. ita deinde.

z) Brook Abridg. tit. adminiſtr. n. 45. & tit. executor. n. 149.

a) Odofred. & Fulgo. in d. L. poſt aditam.

b) Conſtat aliàs à Iaſone, Sichardo. & alijs, in d. L. poſt aditam, aſſignari rationes, quæ tamen non tanti ſunt apud nos momenti; non tamen erit inutile illos in hac re conſulere.

c) Zaſ. in d. Tract. de ſubſtit. c. 1. membro 5. concl. 1. limit. 1.

d) Bar. in d. L. 1. de vulg. ſub. n. 49. cuius opinio communis eſt, teſtimonio Graſſ. Theſaur. cō. op. §. ſubſtitutio. q. 15.

e) Iaſ. in L. quamdiu. de acquir. hæred. ff. quā opinionem dicit eſſe communem. n. 9.

f) Vide infr. 6. part. § 13

to be admitted, as if the former executor had refused[g]. And finally, whereſoeuer it is likelie that the teſtator would haue ſubſtituted in the caſe not expreſſed, if hee had remembred the ſame, as wel as in the caſe expreſſed; there the ſubſtitute is to bee admitted, as if the ſame caſe had beene expreſſed[h].

g) Bar. in d. L. 1. ff. de vulg. ſub. & poſt eum Zaſ. in d. Tract. de ſubſt. c. 1. verb. primus effect.

h) Bar. & Iaſ. vbi ſupra.

12 The ſecond concluſion is, that † the ſubſtitute ſhall ſucceed in ſuch part and quantitie of the teſtators goods, as was aſſigned to him that was inſtituted executor in the former degree, be it more or leſſe[i]: ſo that if the inſtituted perſon were made executor of the one halfe of the teſtators goodes, the ſubſtitute ſhall be admitted executor of the one half; or if the inſtituted perſon were made executor of a third part, or of goodes in a certaine place, the ſubſtitute ſhall 13 ſucceed and be admitted accordingly[k]. And † if diuerſe be ſubſtituted to one, they ſhall ſucceed equally: but if the ſame ſubſtitutes were alſo inſtituted executors, and that vnequally (for that perhaps to ſome more, to ſome leſſe is allotted:) In this caſe, if any of the inſtituted executors, will not, or can not be executor, the portiõ of that executor ſhal not be equally diſtributed amõgſt the ſubſtituted executors, but according to the portiõ of the firſt aſſignation: that is to ſay; he that is an inſtituted executor of a greater part, ſhal be ſubſtitute of a greater part; & he that was inſtituted of leſſe, ſhal be ſubſtituted of leſſe[l] (a ratable & iuſt proportion obſerued) the reaſon is, becauſe the ſame affectiõ is preſumed in the ſubſtitutiõ which was in the inſtitution[m]. 14 Notwithſtanding, if † the executors vne-

i) L. 1. C. de impub. & al. ſub. §. & ſi. Inſtit. de vulg ſub. L. ſi plures. ff. de vulg. & pup. ſub.

k) DD. in d. L. 1. Minſin. in d. §. & ſi plures. de vulg. ſub.

l) Bald. Paul. de Caſtr. & Sichard. in d. L. 1. de impub. & alijs. ſub. C. Mantic. de coniect. vlt. vol. lib. 5. tit. 1. n. 20.

m) Minſing. in d. §. & ſi Inſtit. de vulg. ſub. per L. licet imperator. ff. de leg. 1. & L. publius. §. Titio. de cond. & demon. & Mantic. vbi ſup.

qually

qually inſtituted, bee ſubſtituted to a legatarie; then in caſe the legatarie will not, or cannot haue the legacie, the ſame ſhall be equallie diuided amongſt the ſubſtitutes[n].

Or if the ſubſtitutes be equally charged by the teſtator, then alſo they ſhall ſucceede equallie, notwithſtanding they were vnequallie inſtituted[o].

Or if the perſons inſtituted executors in the firſt degree be aſſigned conditionallie, the ſubſtitutes aſſigned ſimplie ſhall not bee charged with the performance of that condition[p], vnleſſe they be ſubſtituted to a conditionall legatarie: for then the condition expreſſed in the former diſpoſition, is vnderſtoode to bee repeated in the ſubſtitution; and therefore the ſubſtitute cannot obtaine the legacie without the performance of the condition[q].

Or † if in the ſubſtitution, the perſons ſubſtituted be not all named by one name appellatiue, but euerie one ſeuerally by his owne proper name; then notwithſtanding they were firſt inſtituted executors of vnequall partes, the diſtribution amongſt them as ſubſtitutes ought to be equall[r]. 15

By names *appellatiue* in this place, I vnderſtand euerie name, which is common or mai e comprehend diuers perſons, or all names except the chriſtian name, or ſurname of any perſon, as when the teſtator doth ſubſtitute, his *executors* his *children*, his *brethren*, his *kinsfolkes*, all which I doo account names appellatiue in this preſent caſe[s]: the cauſe of the difference (as moſt doo thinke)

n) L. vnic. §. ſed vt manifeſtetur. C. de cad. tol. & ibi Paul. de Caſt. Sichard. in d. L. 1. de impub. & al. ſub. col. 5. ver. nec mouet.

o) L. quoties. ad Trebel. L. vtrum. §. fin. de rebus dub. ff. Dec. in d. L. 1. n 10.

p) L. ſi ſub conditione. de hæred. inſtit. & ibi Bar. Bald. Imol. & alij. ff Et hæc eſt communis ſententia, vt p Mantic. de conject. vlt. vol. lib. 10. tit. 6. n. 2.

q) Dec. in d. L 1. de impub. & al. ſub. C. in fin. L. 1. §. pro ſecundo. C. de cad. tol. quod tamen intellige, vt per Mātic. de conject. vlt. vol. li. 10. tit. 6. n. 9. cum ſeq.

r) L. nonnunquam. ff. ad Trebel. & ibi DD. Viglius, & Minſing. in § & ſi. Inſtit. de vulg. ſub.

s) Sichard. poſt Paul. de Caſtr. & alios, in d. L. 1. de impub. et al. ſub. C. n. 5. in fin. Minſing. et Vigl. in d. §. ſi ex diſparibus.

thinke) is the force of this worde *and*, which worde being moſt commonly vſed, and almoſt neceſſarie, where ſoeuer the teſtator dooth ſubſtitute diuers perſons, by their ſeuerall proper names, the nature and force thereof is ſuch, as it doth make equall diſtribution [t]; without the which the ſubſtitution ſhall be proportionable to the inſtitution: inſomuch that if the teſtator doo ſubſtitute diuers by their proper names, without that worde *and*; as if the teſtator ſay, I ſubſtitute the two Iohns at Noke. In this caſe, the teſtators being inſtituted vnequallie in the firſt degree, the ſubſtitutes are to ſucceede vnequallie likewiſe [v].

t) Paul. de Caſtro. Iaſ. & Sichard. in d. L. 1. de impub. & alijs. ſub. C.

v) Iidem Caſtrenſ. Iaſ. Sichard. in d. L. 1.

But what † if the teſtator doo ſubſtitute by both kinde of names, aſwell by the appellatiue, as by the proper names: or what if ſome be ſubſtituted by the proper names; others by ſome name appellatiue: what if it bee doubtfull by whether kinde of name they were ſubſtituted: whether in this caſe ought the ſubſtitutes to ſucceed equally, or vnequallie, according to the proportion of the ſubſtitution [x]. 16

x) Has queſtiones cum multis alijs expeditas habet Iaſ. in d. L. 1.

When the ſubſtitution is made by both names iointly, we are to conſider, whether the names appellatiue, or the proper names haue the firſt place in the diſpoſition: For if the appellatiue goe before, then the ſubſtitutes are to be admitted, as if their proper names were not at all expreſſed, that is to ſay, according to the proportion of the inſtitution: but if the proper names enioy the firſt place, then the ſubſtitutes are admitted equally, notwithſtanding their vnequall

vnequall inſtitution[y].

When † ſome be ſubſtituted by their proper names, others by names appellatiue; they which be ſubſtituted by their proper names do ſucceede equally: the others according to the proportion of theirinſtitutions[z]. 17

When it is doubtfull, by whether names they be ſubſtituted (for that perhaps the witneſſes do not remember what maner of wordes the teſtator did vſe) in this caſe, they ſhall ſucceede according to the proportion of their inſtitution[a].

y) Iaſ. & Sichard. in d. L. 1. quæ quæſtio communis eſt, quam etiam aduerſus Curtium defendit Viglius, in d. §. & ſi ex diſparib⁹. Inſtit. de vulg. & pupil. ſub. n. 7.

z) Iaſ. poſt Salicet. in d. L. 1.

a) Bar. in L. 1. ff. de vulg & pupil. ſub. Iaſ. & Sichard. in d. L. 1. C. de imp. ſub. & al. ſub.

Howe manie may be appointed executors.

1 *Either one alone, or moe perſons may be appointed executors.*
2 *What if the teſtator make all the worlde his executor.*
3 *What if he ſay, I make the poore my executor, or the Church, or my kinne.*
4 *Where diuerſe be named executors, all are to be admitted, and not one without the reſt.*
5 *The extenſions of this former concluſion.*
6 *The limitations of the ſame concluſion.*
7 *Whether the executor of the executor is to be ioined with the executor ſuruiuing.*
8 *What if the executor ſuruiuing die inteſtate.*
9 *The executor of the executor, may ſomtimes be ſued as executor in his owne wrong.*
10 *If the impediment be not long, the executor is to be expected.*

11 *One*

11 *One of the executors may execute when the rest refuse.*

12 *Whether the coexecutor be excluded by his refusall before the ordinarie.*

13 *Other causes wherein one executor alone may sue, or be sued without his fellowes.*

14 *Whether one executor may sue another.*

15 *Certaine cases wherein one executor maie sue another.*

16 *Howe the goodes are to be distributed among the executors, to whome the testator giueth the residue.*

17 *If the testator make the child in the mothers womb executor, and the mother bring forth two or three children at one birth, they are all to bee admitted executors.*

18 *If the testator doo bequeath an hundred pounde to the childe in the mothers wombe, and the mother is deliuered of two or three, whether are each of them to haue an hundred pound, or but one hundred amongest them.*

19 *What if the testator make his wife and the childe in her wombe executors, willing that if it be a man childe, hee to haue two partes of the residue of his goodes, and his wife but one: and if it be a woman childe, then his wife to haue two partes, and his daughter but one: Admit nowe, the mother haue both a sonne and a daughter at one birth, howe is the goodes to be distributed?*

§. xx.

FIrstly, either one perſõ† may bee appointed executor alone, or diuerſe perſons together[a], euen as many as the teſtator liſt to appoint, ſo that† the number be not infinite, as to ſay, I doo make all the men of the worlde my executors[b]: for to appoint executors in that ſort, were an argument that the teſtator were not of perfect minde, and memorie[c]: Beſides that it is impoſſible[d], for all to execute, and therfore a voide aſſignation, at leaſt in effect[e]. But† if the teſtator make the *poore* his executors, or the *Church*, or his *kinne*, giuing to them the reſidue of his goodes, albeit hee doo not declare which poore, what Church, or which kinneſfolkes, neuertheleſſe the diſpoſition is not void, as elſewhere is declared[f]. 1 2 3

When† the teſtator dooth make diuerſe perſons executors, they are all to be admitted to the executorſhip, and not one alone without the reſt[g], which concluſion is diuerſly both extended and limited. 4

The† firſt extenſion is, that albeit the teſtator doo appoint his owne ſonne, and a ſtranger his executors; the ſtranger if he can and wil, is to be admitted with the teſtators ſonne: for howſoeuer in this caſe by the ciuill lawe, the teſtators ſonne is vnderſtoode to bee inſtituted in the firſt degree, and the ſtranger no more but ſubſtituted, or appointed in the ſecond degree, 5

and

a) §. & vnum. Inſtit. de hæred. inſtituend.

b) Porcius. in d. §. & vnum. qui refert hanc opinionem eſſe communem, licèt Graſſ. Theſaur. com. op. §. Inſtitutio. q. 13. exiſtimet contrariam eſſe magis cõmunem, nempe huiuſmodi inſtitutionem mero iure ſubſiſtere, ſed re & effectu irritã, & inanem reddi.

c) Porcius in d. §. & vnum.

d) Idem Porcius. ibid.

e) Gloſſ. in d. §. & vnũ. Graſſ. d. q. 13.

f) Infra 7. part. §. 8. vide Dyer. fol. 160.

g) c. religioſa. §. ſane. de teſta. lib. 6.

and ſo to be admitted, in caſe the ſonne cannot or will not be executor[h], yet by the lawes and cuſtomes of this realme it is otherwiſe,& both are to be admitted alike[i].

The ſecond extenſion is, that although the executors bee appointed alternatiuely, or diſiunctiuely: As for example, the teſtator maketh A.B.or C.D. his executors: In this caſe both the perſons are to bee admitted executors[k], and this worde, *or*, in fauour of teſtaments is taken for *and*[l], and ſo it is in effect, as if the teſtator had ſaide, I make A.B. and C.D. my executos,ſauing in certaine caſes elſe where expreſſed[m].

The thirde extenſion is, that where there be diuerſe executors,the action commenced by them,or againſt them,ought to be commenced in all their names, and not in the name of ſome of them onely[n].

6 The † limitations of the former concluſion are many, but they may all almoſt be reduced to two,whereof the firſt is, when the other coexecutor *cannot be* executor[o]: the ſecond is whē he *will not* vndertake the executorſhip[p]. For the better vnderſtanding of the which two limitations, Firſt, concerning the former of them, we are to note,whether the impediment be *perpetuall or temporall.*

If the impediment be *perpetuall,* becauſe perhaps the coexecutor is dead, or perhaps ſuch a perſon as is vtterly incapable of an executorſhip,then he that is liuing and able to execute, may be admitted to the executorſhip; notwithſtanding

h) Gloſſ.& Bar.in L. Gallus.§.quidā rectè. ff.de lib.& poſthu. Graſſ.Theſaur.com.op §.Inſtitutio.q.20.n.6.

i) Quippe ceſſante cauſa,& ratione iuris ciuilis nimirùm inſtituendi neceſſitate, ceſſat & ipſius legis effectus.c.cum ceſſante.de app.extra.

k) L.quidā.C.de verb. ſig.Mantic. de coniect. vlt.vol.lib.4.tit.3.n.19.

l) d.L.quidam.& ibi Bar.& Iaſ.

m) Infr.7.part.§.9.& ibi tres extant limitationes.

n) Io.de Athon.in legatin.libertatem.de execu.teſta.Brook Abridg.tit.exec.n 117.

o) Intellige in executoribus hæreditatē adeuntibus ,aliàs indiſtinctè in vtroque caſu non eſt verum.

p) c.religioſa.§.ſane.de teſta.lib.6.

d.§.ſane.& ibi Domi.& Phil.Franc.

ſtanding the impediment of the coexecutor[q], vnleſſe the teſtator did will expreſly, that the one ſhould not execute without the other[r]: otherwiſe if † two be appointed executors, and 7
the one maketh his teſtament, wherein hee nameth his executor, and dieth, his executor ſuruining: In this caſe the executor of the executor, is not to bee ioined with the executor ſuruiuing: neither in the execution of the will[s]; nor in ſuits or actions[t]. And if the executor of the executor, haue any goods or cattels in his hād, which did belōg to the firſt teſtator, the executor of the ſame teſtator ſuruining, may haue an actiō againſt the executor of the executor for the ſame[v]: In ſo much that if the † executor ſur- 8
uiuing, doo afterwardes die inteſtate, yet may not the executor of the executor meddle with the goods of the former teſtator: for the power of the executor who died firſt, was determined by his death, the other then ſuruiuing[x]: and the ordinarie in this caſe may commit the adminiſtration of the goodes of the ſuruiuing executor, who died afterwardes inteſtate, to the widowe, or to the next of his kinne: and may alſo commit the adminiſtration of the goods of the former teſtator not before adminiſtred, to the widdowe, or next of kinne to the ſame teſtator[y]. And † if the executor of the executor who 9
died firſt, meddle with the goods of the firſt teſtator, hee may be ſued by the creditors of the firſt teſtator, as executor in his owne wrong[z].

If the † impediment be *not perpetuall, but* 10
temporall; then we are to conſider, whether the ſame

q) d.§.ſane.& ibidem Franc.et alij.
r) Eod.§.ſane.in fin.
s) d.§.ſane.et ibi gloſſ.
t) Brook Abridg.tit.executor.n.92.160.
v) Brook,tit.executor. n.99.
x) Brook.tit.executor. n.149.
y) eod.n.149.
z) Brook Abridg.tit. exec.n.29.99.

same be like to endure for a long time or but for a short time: If the impediment bee like to continue long, for that perhaps the coexecutor is beyond the seas, or in some by place farre distant[a], or for that peraduenture the coexecutor is yet vnborne, or but a babe (for such persons may bee named executors[b]:) then the other executor is to bee admitted in the meane time[c], for the lawe woulde not that mens testaments or last willes should be deferred, but with al conuenient speed executed and perfourmed[d]: But if the impediment be but of a short time, then the one executor is to expect his fellowe, and is not in the meane time to be admitted alone to the executorship[e].

a) Io. And. et Phil. Franc. in d. §. sane.

b) Vt infr. part. 5. §. 1.

c) d. §. sane. et DD. ibid.

d) Franc. in d. §. sane.

e) Idem Francus post Io. And. in d. §. sane.

II When † the executor may vndertake the executorship, but doth *refuse* so to doo, then is the other executor to be admitted alone, and may execute the will, or commence any suite, or be sued alone, as if none other had beene named executor[f]. which conclusion is true, if the executor refusing do still persever in his vnwillingnesse: but † if he alter his minde, and afterwards become willing, then so long as the executor who prooued the will is liuing, (his former refusall before the ordinarie notwithstanding) he may by the lawes and customes of this realme, ioine with the other executor, who prooued the will[g]. And if he release any debt due to the testator, the release is as sufficient, as if he had neuer refused[h]. To these two limitations may a third be added, whereby one executor may sue or be sued, without the other co-

f) d. c. religiosa. §. sane. de testa. lib. 6.

I

g) Brook Abridg. tit. executors. n. 38. & n. 117.

h) Brook. d. tit. n. 117. & n. 177.

executor: namely, † when no exception is made 13
against the proceedings by the partie[i]: heere-
vnto also may be added a fourth limitation, that
is to say, when any one of the executors, dooth
sell some of the testators goodes for a summe of
money, for then that executor which solde the
goodes, may himselfe alone sue for the money
due for the same goods[k].

Furthermore it is to be noted, that when
the testator doth make diuers executors, if † a- 14
nie of them do get the possession of the goods
of the testator, the other executor hath no acti-
on for recouerie of the same goods, or any part
thereof[l]: for one executor can not sue ano-
ther[m]. Howbeit † if the testator make diuerse 15
executors, and do bequeath to the one of them
the residue of his goodes; it is not onely law-
full for him to whom they are bequeathed, to
retaine the same; but also if the other executor
enter thereunto, hee is subiect to an action of
trespasse[n]. Likewise, if the testator do bequeath
vnto all his executors the residue of his goods,
the same ought to bee equally distributed a-
mongst them: In which case I suppose the office
of the ordinarie to whom they are accompta-
ble, is of great authoritie, if one of them seeke
to defraude another[o].

But † what if the testator make many exe- 16
cutors, giuing them the residue of his goods, of
which executors he nameth one by his proper
name, the rest by a name collectiue: As for
example, the testator saieth, I make my brother
and his children my executors, to whom I be-
queath

i) Io. de Athon. in legatin. libertatem, de execut. testam.

k) Brook Abridg. tit. exec. n. 66.

l) Brook. tit. exec. n 98.

m) Infr. part. 6. §. 3.

n) Brook. d. tit. execut. n. 104.

o) c. tua nos. de testam. extr. Brook Abridg. tit. accompt. n. 8.

queath the reſt of my cleare goodes: whether in this caſe ought the father to haue as much as all his children, or whether ought euery childe to haue as muche as the father: I ſuppoſe that in this caſe the reſidue of the deathes part ought to be diuided into two partes, and that the father ought to haue as much as all the children [p]: for it is deliuered for a rule, that where diuerſe perſons be comprehended vnder one name collectiue, with another third perſon, then all they which be included vnder that one name, doo repreſent one onely perſon [q]. Of which rule, neuertheleſſe there be diuers exceptions: One is, when the teſtator willeth the ſaid goodes to bee equally diuided amongſt them [r]. Another is, when the children were not borne at the time of the making of the teſtament [s]. The third, and that is generall, is when the teſtator meaneth that euery perſon ſhall haue a like portion [t]: for in thoſe caſes the rule doth not hold, but diſtribution is to be made according to the number of the perſons: that is to ſay, if there be three perſons, then the reſidue of the deathes part is to be diuided into three parts, & if there be foure perſons, then into foure parts, and if there be mo, then into mo parts, euery part equall for euery perſon.

p) Iaſ. in L. fin. de impub. & al. ſub. C. Dec. conſil. 236. & conſ. 254

q) Iaſ. in d. L. fin. Mantic. de coniect. vlt. vol. lib. 4. tit. 9. quem operepretium erit videre.

r) L. interdum & ibi Paul. de Caſtr. ff. de hęred. inſtit. Dec. conſil. 597.

s) Iaſ. in d. L. fin. per L. quidā. §. ſi tibi de reb. dub. ff.

t) Iaſ. in eand. L. fin. quę velim videas, nam ibi tradidit regulam ſeptē limitationibus dotatā.

17 If † the teſtator do appoint the childe in the mothers wombe his executor, and it falleth out that the mother dooth bring forth two or three children at that one burthen, they are all to be admitted executors [v]: And as they are all to be admitted to the executorſhip, ſo are they all to

v) Iaſ. in L. placet. ff. de lib. & poſthu. Mantic. de coniect. vlt. vol. lib. 4 tit. 8. n. 4.

enioy the legacie. And therefore if the teſtator ſay, I doo bequeath an hundred pounde to the childe in the mothers wombe, and if ſhe dooth beare two or three children, the legacie is to be diuided amongſt them [x]. But if the teſtator ſay, if my wife ſhall bring forth any child, I giue to the ſame an hundred pound: and ſhe bring forth two or three children; in this caſe euery childe may obtaine an hundred pound, if the teſtators goodes do ſuffice to ſatisfie the ſame [y], vnleſſe it be prooued, that it was the teſtators meaning that they ſhould haue no more but an hundred pound amongſt them [z].

x) Paul. de Caſtr. in L. qui filiabus. §. 1. ff. de leg. 1.

y) d. L. qui filiabus. §. 1. & DD. ibid.

z) Text. in d. §. 1.

What ſhall we ſay to this queſtion, The teſtator maketh the childe in the mothers womb executor, and willeth that if it be a man childe, hee ſhall haue two partes of the reſidue of his goodes, and the mother but one; and if it bee a woman childe, that then the mother ſhall haue two parts of the ſaid reſidue, and the daughter but one: The will being thus framed, the mother bringeth forth a ſonne & a daughter, how much of the teſtators goods is due to each perſon? In this caſe euery perſon is to haue a portion of the teſtator [a]: that is to ſay, the ſonne ſhal haue twiſe ſo much as the mother, and the mother twiſe ſo much as the daughter: for example, the reſidue of the teſtators goods ariſing to ſeuen ſcore poundes, the ſonne ought to haue foureſcore pounds, the mother fortie, and the daughter twentie: ſo the mother hath double ſo much as the daughter, and the ſonne hath double ſo much as the mother. 18

a) L. ſi ita. ff. de lib. & poſthu.

But

19 But what † if the will being ſuch as before, viz. that the iſſue being maſculine, ſhall haue two partes, and the mother but one: and being feminine, to haue but one part, and the mother two: the mother doth bring foorth an Hermophrodite, or perſō hauing the part both of a mā & a woman: whether ſhal this Hermophrodite haue ſo much as if two children male & female had bene both borne? The Hermophrodite can haue but one portion: that is to ſay, the portion due to that Sex, whereof the Hermophrodite doth moſt participate [b]: and if that alſo be doubtfull, it is to be preſumed according to the more worthie kinde [c].

b) L. quæritur. ff. de ſtat. hom.
c) Addic. ad Bar. in d. L. quæritur.

Of thoſe things vvhich doo appertaine to the apparance of the teſtament.

1 *Euerie teſtament is to be proued by witneſſes, or by writing.*
2 *Two witneſſes needfull, and two ſufficient.*
3 *What if the witneſſes be not free from all exception, whether doth the number ſupplie the defect.*
4 *Somtimes one witneſſe is ſufficient.*
5 *Euerie one maie bee a witneſſe which is not forbidden.*
6 *Three eſpeciall cauſes, which do miniſter exceptions againſt witneſſes.*
7 *Who are excluded for their diſhoneſtie.*
8 *All malefactors are not repelled from witneſsing.*
9 *Who are excluded for want of iudgement, and how long.*

10 *Who are excluded for affection, and how farre.*
11 *Whether a legatarie may be a witneſſe.*
12 *Whether a woman may be a witneſſe.*
13 *Whether a poore man may be a witneſſe.*

§.xxj.

HAuing ſpoken of the *general internall forme*, common to euery teſtament, that is to ſay, of the making of an executor: nowe let vs returne to the *generall externall forme*, that is to ſay, the forme whereby euery teſtament may lawfully appeare.

Wherefore † that willes and teſtamentes 1
may lawfully appeare, it is requiſite that there bee ſufficient proofe, either by *witneſſe*, or by *writing*[a].

Of proofe by writing, it followeth afterwards, in the handling of the particular forme of written teſtaments[b].

Concerning proofe to be made by witneſſes, two things are eſpecially to be examined: Firſt, *howe many witneſſes* are required for the full proofe of a teſtament or laſt will: Secondly, *what maner perſons* maie bee receiued for witneſſes.

For the *number*, By † the lawes and cuſtomes 2
of this realme, two witneſſes are needfull[c], and againe two are ſufficient[d]: So that as it is not neceſſarie to haue any more then two; ſo it is vaine to haue no more but one[e]: For the better vnderſtanding of the which twofold concluſion:

Firſt,

a) Maſcard. Tract. de probac. verb. teſtamentum, alioquin præſumi quemlibet ab inteſtato deceſſiſſe cõfirmat, Mantic. de coniect. vlt. vol. lib. 2 tit. 1.
b) Infr. ead. part. §. 25.
c) Ius autem ciuile exigit ſeptem. §. ſed cum paulatim. & §. fin. Inſtit. de teſta. ordin.
d) Lindw. in c. ſtatutũ. verb. probatis. de teſta lib. 3. prouinc. conſtitu. Cant. Peckius. in c. priuilegium. de reg. iur. 6. n. 7.
e) Iaſ. in L. cunctos. C. de ſumma Trinitate. Hyppol. Singul. 102.

Firſt, where it is affirmed that two witneſſes be ſufficient: that is to be vnderſtood, in caſe the ſame two witneſſes be without cauſe of exception[f]: but if they be not lawfull witneſſes, two alone are not ſufficient for the proofe of a laſt will[g], at the leaſt where the ſame is to be prooued in forme of law.

f) c. relatum. el. 1. de teſta. extr. Lindw. in d. c. ſtatutum verb. probatis. Mantic. de coniect. vlt. vol. lib. 6 tit. 3. n 5. 6.

g) d. c. relatum. & c. cũ eſſes. de teſta. ext. & ibi DD.

3 But what if† the witneſſes be not free from al exception, but yet are more in number then two, ſuppoſe three or foure: whether be they ſufficient for the proofe of the will? It may be anſwered; that if the exceptions whereunto the witneſſes are ſubiect, be light or ſlender, ſuch as do in part diminiſh the credite of their teſtimonie, as the exception of friendſhip, domeſticitie, or of ſuſpition of ſome ſmall fault; there the number dooth ſupplie the defect, and ſo the teſtimonie of three witneſſes, not altogether cleare from thoſe exceptions, is as the teſtimonie of two witneſſes without all exception[h]: But when the exceptions whereunto the witneſſes be ſubiect, are great and heinous; as the exception of periurie, which dooth vtterly extinguiſhe all the credite of the depoſition[i]; or when the witneſſes are ſubiect to double exception[k]; or when the lawe dooth reſiſt the examination[l] of the witneſſes, as of thoſe that be perpetually mad, or haue no vnderſtãding; or whẽ the defect is not in the perſon, but in the depoſition[m]; in theſe and like caſes the number doth not ſupplie the defect, but the teſtimonie of them all is as the teſtimonie of none[n].

h) Mantic. de coniect. vlt. vol. lib. 6. tit. 3. n 8.

i) Maſcard. de probac. verb. periurus. Ampl. 1. Alciat. de præſump. reg. 2. præſump. 10.

k) Soarez. lib. recep. ſen. verb. teſtis. n. 215. Gabr. lib. 1. com. concl. tit. de teſtib. concluſ. 7. n. 13. Hyp. de Marſil. Sing. 385. Menoch. de arbr. iud. lib. 2. caſ. 99. Grauetta. conſ. 249.

l) Felin. in c. dilecti. de accuſ. extr. Pariſ. conſil. 58. n. 52. vol. 4.

m) Ruin. conſ. 149. 150. vol. 5. Gabr. lib. 1. com. concluſ. tit. de teſtib. concl. 6. n. 9.

n) Vide eund. Gabr. d. concl. 6.

4 Secondly, where† it is affirmed that one witneſſe

neſſe is as none; yet ſuch is the power and aucthoritie of the teſtator, that he may ordaine that that one witneſſe ſhall make a full proofe, as if the teſtator commit ſomewhat in ſecrete vnto him (being loth perhaps that anie other ſhould knowe thereof) and willeth in his life, that that perſon alone ſhall bee credited for the declaration of his will: In this caſe that one perſon alone is ſufficient to prooue the contents of the laſt will and teſtamente of the perſon deceaſed[o].

o) L. Theopom. ff. de dote præleg. Olden. de probac. fol. 286. b.

For the ſecond queſtion; that is to ſay, *what maner of perſons* are to be receiued for witneſſes: This maie be deliuered for a rule, that † whatſoeuer perſon is not by lawe forbidden to bee a witneſſe, the ſame perſon is to bee admitted[p]. This rule is ſhort; but if we ſhould deſcende to the exceptions, and ſhewe in particular, what perſons are in this caſe forbidden to beare teſtimonie by the ciuill and eccleſiaſticall lawes, we ſhould finde it a matter of ſuch diſcourſe, as the ſame ſhould farre exceede the quantitie of this ſmall volume: for there be manie volumes of this argument onely[q]. Beſides it is a matter wherein verie much is left to the diſcreet conſideration of the circumſpect Iudge[r], ſo that it is verie hard alſo, to preſcribe any certaintie in this behalfe[s]: onely I will remember three † ſpeciall cauſes whereby the witneſſes are not *omni exceptione maiores*: the firſt is diſhoneſtie in maners: the ſecond is want of iudgement or vnderſtanding: the third is affection more to the one partie then to the other[t].

5

p) L. 1. §. 1. ff. de teſtib.

6

q) Id quod pluſquam manifeſtum eſt per illum lib. qui inſcribitur Tractatus de teſtibus probandis, vel reprobandis. Var. authorum. &c.

r) L. 3. §. 1. de teſtibus. ff.

s) Bar. Bald. & alij ind. L. 3. §. 1.

t) Has cauſas veluti præcipuas proſequitur Albericus in Tract. de teſtib. part. 1.

The

7 The firſt † cauſe dooth miniſter exception, not onely againſt periured or foreſworne perſõs[v], but alſo againſt al other malefactors, or lawbreakers[x], which by anie crime by thẽ cõmitted become infamous[y]: for it is ſaide to bee a dignitie to be a witneſſe[z]. But al ſuch perſons, as are infamous by their euill life, the lawe eſteemeth vnworthie of any dignitie[a], which alſo ponderet the credite of each mans ſaying, with the grauitie of his life[b]; and therefore light life, light
8 credite alſo. Howbeit † amõgeſt many limitations of this exception, drawen from the euil life of the witneſſe[c], this is one, that if any man hauing cõmitted any crime, (periurie excepted[d]) hath reformed his mãners, cleare frõ his former fault, & hath liued honeſtly & laudably by the ſpace of three yeares before his ſaid productiõ, ſuch a perſõ is not repelled frõ being a witnes[e].

9 The ſecond † cauſe doeth comprehend children[f], idiotes[g], lunatike perſons[h], and ſuch like, of whom it may be ſaid as of the former: that as they which reforme their euill manners, and afterwardes liue an honeſt and commendable life are not to be repelled, ſo theſe perſons being altered in their knowledge, that is to ſay, the child being growen to yeares of diſcretion, the idiote made wiſe, or the lunatike perſon not diſtracted by his fitte, or frenſie; then their teſtimonie is to be receiued euen of thoſe thinges which were done during the time of their minoritie[i], or madnes[k], ſo that they were not vtterlie voide

v) De periuri teſtimonio late Maſcard. de probac. verb. periurus. concl. 1168.

x) De teſte criminoſo idem Maſcard. de probac. verb. criminoſus. concl. 469.

y) De infamibus, ſiue iuris, ſiue facti. optimè Iaſin L. cunctos. C. de ſumma Trinitate.

z) Aufrer. Tract. de teſtibus. verb. dignitas.

a) c. infamibus. de reg. iur. 6.

b) L. 2. & 3. ff. de teſtib.

c) De quibus Maſcard. & Iaſ. ille. concluſ. 464. & concluſ. 1168. hic in L. cũctos. C. de ſumma Trinitate.

d) Maſcard. de probac. concl. 1168. n. 16.

e) c. teſtimonium. de teſtibus extr.

f) §. teſtes Inſtit. de teſta. ord.

g) Rebuff. de reprobac. & ſaluac. teſt. verb. furioſus. Campeg. Tract. de teſtib. reg. 114. Bar. Tract. de teſtib. n. 98. vbi conſtituit diff. réti. inter ſtultos & fatuos.

h) d. §. teſtes. & Minſin. in §. furioſi. Inſtit. de Curator. vbi diſtinguit inter furioſum & mente captum.

i) Angel. Arc. in d. §. teſtes. Alberic. Tract. de teſtib. c. 5. n. 18. (k) Maſcard. Tract. de probac. verb. furioſus. cõcl. 828.

of

of vnderſtanding in thoſe former eſtates [l].

The third † cauſe, which is affection, doeth 10
reach vnto thoſe witneſſes which be of kinred or alliance[m], or which be tenants, ſeruants, or of the houſholde of the partie producting them[n], and to the enimies of the partie againſt whom they are produced[o]: Item to all thoſe which are to reape any benefite by their depoſition[p]: whercin (as in many thinges els) very much is attributed to the diſcretion of the Iudge, who as the kinred or affinitie betwixt the witneſſes and the partie, is neare or farre off, the feare of the tenant or ſeruant, of the diſpleaſure of his Lord and maſter, great or little, the enmitie betwixt the witnes and the aduerſe partie, hoat or colde, or the commoditie of the witnes is to reape, more or leſſe: So the wiſe Iudge ought to giue more or leſſe credite to their ſaiyngs and depoſitions [q].

What ſhall wee ſaye of the teſtimonie of theſe perſons? namely, of a legatarie, of a woman, and of a poore man.

I ſuppoſe the † teſtimony of the legatary to 11
bé good for the reſt of the will[r], but not for his own legacy [s]: and therfore where there be but two witneſſes of a will, wherin either of them hath ſomewhat bequeathed vnto him, th is will is not ſufficiently prooued for thoſe legacies[t], but for the reſt of the will it ſeemeth to be ſufficiently proued[v].

A woman † is alſo a good witnes in this caſe 12
by the lawes Eccleſiaſticall[x]: And whatſoeuer diuers doo write, that a woman is not without all

l) Iul. Clar. pract. crial. q. 24. Alberic. d. Tract. c. 5. n. 24.

m) De quibus Alberic. Tract. eod. & Hector Æmilius, Tract. de teſtibus. verb. affinis.

n) De his teſtibus. idem Alberic. d. Tract. c. 2.

o) Inimicus quatenus repellendus, docet Maſcard. in d. Tract. de probac. concl. 899. quatenus verò recipiẽdus, Campegius. Tract. de teſtibus. reg. 23.

p) Albericus. Tract. de teſtibus. c. 4.

q) De huiuſmodi teſtibus, Hector Æmilius. Tract. de teſtibus. verb. affectionem habens. Gabr. lib. 1. com. concl. tit. de teſtib. concl. 9. 10. 11. 12. 13. 14. 15. 16. Panor. in c. ſuper eo. de teſtib. extr. n. 8. Rebuff. de reprobac. & ſaluac. teſtiũ. verb. inimicus. verb. domeſticus. & verb. conſanguineus.

r) §. legatarijs. Inſtit. de teſtam. ord.

s) Porcius in d. §. legatarijs.

t) Bar. in L. omnibus. C. de teſtibus. & Porci' in d. § legatarijs.

v) Albericus. Tract. de teſtib. c. 4 n. 57. verſ. in hoc aſ.

x) Panor. & Couar. in c. cum eſſes. de teſta. extra.

all exception[y], becauſe of the inconſtancie and frailty of the feminin Sex, wherby they may the ſooner be corrupted[z]: yet I take it that their teſtimony is ſo good, that a teſtament may be proued by two women alone, being otherwiſe without exception[a].

13 A poore †man likewiſe, being an honeſt man is not forbidden to be a witnes[b].

y) Dec. in L. fœmina. de reg. iur. ff. Grauetta. conſil. 99. n. 5.

z) c. forus. de verb. ſignif. extr.

a) Sichard. in L. hac conſultiſſima. § ex imperfecto. C. de teſta. Ripa. Tract. de peſte. c. 2. n. 24. quæ ſententia cõmunis eſt. Couar. in d. c. cum eſſes. n. 14.

b) Viuius Theſaur. cõ. op. verb. teſtis. Tu verò Iuſtinianiſta, vide Gab. lib. 1. com. conclu. tit. de teſtib. concl. 18. vbi tradita eſt regula de paupere teſte, variè tùm ampliata, tùm limitata.

Of the particular formes of Teſtaments.

1 *So many particular formes, as kindes of Teſtamentes.*

§. xxij.

THe † particular formes of teſtaments be no fewer in number, than are the ſeuerall kindes of teſtaments: For euery kinde hath his particular forme, by the which it differeth from the reſt[a].

a) L. Iulianus. §. ſi quis. ff. ad exhibendum.

The ſeuerall kindes of teſtaments are theſe: that is to ſay, Some be ſolemne teſtaments, and ſome be vnſolemne: ſome written, and ſome nuncupatiue: ſome priuiledged, and ſome vnpriuiledged[b]. Of the particular formes of euery which kinde, albeit I haue already ſaid ſomething in their ſeuerall definitions: yet now alſo it ſhall not be in vaine to adde thereunto theſe things following.

b) Supra prima parte §§. 8. 9. 10. 11. 12. 13. &c.

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s) Porcius in d. §. legatarijs.

t) Bar. in L. omnibus. C. de teſtibus. & Porci⁹ in d. § legatarijs.

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all exception[y], becauſe of the inconſtancie and frailty of the feminin Sex, wherby they may the ſooner be corrupted[z]: yet I take it that their teſtimony is ſo good, that a teſtament may be proued by two women alone, being otherwiſe without exception[a].

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b) Supra prima parte §§. 8. 9. 10. 11. 12. 13. &c.

Of

Of the forme of a ſolemne teſtament.

1 *Diuers things ought to concurre to the forme of a ſolemne teſtament.*
2 *No man tied to the obſeruation of this ſolemne forme.*

§.xxiij.

IN the making of ſolemne teſtaments manie things are requiſite, whereof if any one be wanting, it is not reputed a ſolemne teſtament[a]. Firſt † it is requiſite that 1 there be ſeuen witneſſes preſent at the making thereof[b]: Secondly, they muſt all be required, neither is it ſufficient, that they bee preſent by chaunce, or vnrequired[c]: Thirdly, it is required, that euery witneſſe doo ſubſcribe his name with his owne hande, if he can write, or els two or three others for him[d]: Fourthly, it is requiſite, that the teſtator doo with his owne hande write his name, whom he will ſhall ſucceede, and haue all his goodes; and if he cannot write, that then he name him before thoſe witneſſes[e]: Fiftly, it is requiſite that the witneſſes bee ſuch as are not forbidden to beare teſtimonie in that behalfe[f]: Sixtly, it is neceſſarie that the witneſſes do ſee and behold the teſtator, and not heare him onely[g]. It is alſo neceſſarie that the witneſſes doo ſeale the teſtament, either with their owne

a) §. ſed cum paulatim. Inſtit. de teſta. ordin. & ibi Minſing.
b) d. §. ſed cum paulatim.
c) Auth. rogati. C. de teſta. L. hæredes palam ff. de teſtam.
d) L. ſingulos. de teſta. ff. & Minſing. in d. §. ſed cum paulatim.
e) L. iubemus. L. cum antiquitas. C. de teſta. Non tamen ita neceſſaria eſt nominatio hæredis, vt proprio teſtatoris ore fiat, quin ſufficit, ſi teſtator, alio interrogante, an velit talem fore hæredem? Reſpondeat ita. DD. in d. L. iubemus. Graſſ. Theſaur. com. op. §. Inſtitutio. q. 17.
f) §. teſtes. Inſtit. de teſta. ordin.
g) Menoch. de arbitr. Iud. q. lib. 2. cent. 5. caſ. 475. n. 23. Minſing. in d. §. ſed cum paulatim.

owne ſeales, or with the ſeale of another[h]. Finally, it is neceſſarie that the teſtament be made at one time, without any intermiſſion, except naturall, ſuch as cannot be auoided[i].

h) d §. ſed cum paulatim.

i) Eod. §. & ibi Minſing

2 A will thus † made is called a ſolemne teſtament, which forme if men would obſerue, (but no man is neceſſarily tied therevnto heere in England[k]) it were a more ſafe way, aſwell againſt the forging of falſe willes, as ſuppreſſing of true willes.

k) Supr. part. 1. §. 9.

Of the forme of an vnſolemne teſtament.

1 *What is requiſite in the making of an vnſolemne teſtament.*

§. xxiiij.

1 IN the† making of an vnſolemne teſtament, it is not preciſely neceſſarie to vſe any of the foreſaide ceremonies: This onely is needfull heer with vs in England, that the teſtator do appoint his executor, and declare his will before two or three witneſſes, whoſe teſtimonie, partly by the lawes eccleſiaſticall[a], and eſpecially by the generall cuſtom of this realm[b], is ſufficient for the probation and approbation of the ſame will, concerning the appointing of an executor, or the diſpoſing of goods and cattels[c].

a) C. cum eſſes. c. relatum. el. 1. de teſta. ext.

b) Lindw. in c. ſtatutū. verb. probatis. lib. 3. Prouincial. conſtit. Cant. Tract. de repub. Angl. lib. 3. c. 7. Peckius. in c. priuileg. de reg. iur. 6.

c) Atque huc tendit quod ſcriptum reliquit Minſing. in Rub. de mil. teſt. n. 6. videlicet, apud eas gentes, quæ iuris ciuilis obſeruatione non tenentur (quarum Anglia eſt præcipua) ius militaris teſtamenti obtinere, ſi nulla Propria lex extet.

Of the forme of a vvritten testament.

1 *Diuers things considerable in a written testament.*
2 *In what matter or stuffe the testamente is to bee written.*
3 *In what language the testament is to be written.*
4 *In what hand may the testament be written.*
5 *VVith what notes or characters is a testament to be written.*
6 *Limitations of the former conclusion.*
7 *Of the words and sentences of a written will.*
8 *Whether it be necessarie that there be witnesses in a written will.*
9 *How the witnesses are to depose in prooving the will to be written by the testator.*
10 *What if the testament bee founde in the testators Chist.*

§. xxv.

a) Supr. 1. part. §. 11.

b) Stat. H. 8. an. 32. c. 1.

c) Eodem stat.

WE haue heard elsewhere, in what cases it is needefull that the testament bee written[a], namely where the testator doth deuise any lands, tenements, or hereditaments[b], and also when the same ought to be written: that is to say, in the life time of the testator[c], with diuerse other questions there absolued. Now † let 1
vs heare of some other things which may seeme to appertaine to the forme of a written testament, namely in *what matter or stuffe* the testament

ment is to bee written, *in what language*, with what *hand, letters, notes or characters*, with what *wordes or ſentences*, and whether it bee alwayes neceſſarie that there be *witneſſes* of a written teſtament

2 For the † *matter wherein* the teſtament is written, the law regardeth not whether it bee paper, or parchment, or other like ſtuffe apt for writing[d].

3 Neither is it material in what † *language* the ſame be written, either Latine, French, or anie other tongue.

4 For the † *hande or letters* wherewith the teſtament is written, the lawe is indifferent whether it be Secretarie hand, Roman hand, Court hand, or any other hand, either faire, or otherwiſe, ſo that the ſame may bee read and vnderſtoode[f].

5 For the † *notes or characters* it skilleth not whether the ſame be *vſuall or vnaccuſtomed*[g]. Vſuall or accuſtomed notes bee theſe, xx.s. for twentie ſhillings. Cl. li. for an hundred and fiftie pounds, 1590. for a thouſande fiue hundred foureſcore and ten, with ſuch like, whereof I might bring infinite examples: vnaccuſtomed notes and characters bee, as when the teſtator dooth vſe the figure (1) in ſtead of the letter (A) the figure (2) in ſteade of the letter (B) the figure (3) in ſtead of (C) &c. or perhaps ſome other more ſtraunge characters then theſe in

d) §. nihil Inſtit. de teſta. ordi. Spec. de Inſtr. edit. §. 8. n. 21. Sed quid ſi quis ſcripſerit voluntatem ſuam in puluere? numquid valebit teſtamentum vt ſcriptum? Et videtur quòd ſic per L. milites. C. de teſta. Hoc vno ſubaudito, nimirum noſtratiũ teſtamenta, omni immunitate, atque adeo iure militari gaudere, vt ſcriptum reliquit D. Smitheus. Tract. de repub. Angl. lib. 3. c. 7. Contrarium tamen ſcilicet non valere huiuſmodi teſtũ. tanquam in ſcriptis conditum, exiſtimo: Saltem ad effectum illum, de quo fit mentio in d. ſtat. H. 8. an. 32. c. 1. id quod ex mente illius ſtatuti facile colligere licet. Et huc ptinet quod ſcriptum reliquit Molin. in L. 1. §. eod. ff. de verb. ob. n. 9.

e) Minſing. in d. §. nihil.

f) DD. in L. quòniam. C. de teſta.

g) Hoc intelligant Iuſtinianiſtæ, pcedere iure gentium quo nos vtimur. Nam iure ciuili teſtũ. in ſcriptis fieri non poteſt per notas aut zypheras inuſitatas, vt tenẽt Bar. Bald. Angel. & alij, in L. quoties. §. 1. ff. de hæred. inſtituend. præterquam in caſibus exceptis, veluti in teſtamento militis, ad pias cauſas, &c. de quibus Vaſq. de ſucceſſ. creat. lib. 2. §. 15. requiſit. 16. Tiraquel. de priuileg. piæ cauſæ. c. 13. Graſſ. Theſaur. com. op. §. teſtũ. q. 10.

h) L. 1. ff. si Tabul. testa. Vasq. d requis 16.

place of letters. Howbeit† if the characters bee such as the same cannot be read or vnderstood, the testament is as if it were not written[h]; or if they may be read and vnderstood, either by the same, or by some other writing, or by any other meanes: yet if that writing were but a draught, or preparation to the testament, and not the testament it selfe, it is without anie force[i]. 6

i) L. ex ea scriptura. ff. de testa. L. fideicõmiss. §. 1. de leg. 3.

Wordes† and sentences, are not required for the forme of a testament, but for the expressing of the will and meaning of the testator[k]; and therefore if the writer by error omit some wordes, whereby the sense is vnperfect: As for example, the Notarie dooth write thus (I make my wife my, of this my last will and testament) leauing out this worde (executur:) in this case the error of the writer ought not to preuaile against the truth of the testament[l]: for the lawe presumeth that more was spoken, though lesse was written[m]: much lesse ought it to bee preiudiciall to the testament, where in steede of the wordes omitted, other wordes of the same sense to such purpose are vsed and expressed[n]: For example, suppose that in the testament it is written, that the testator dooth bequeath such landes to such person, to haue and to holde to him and to his assignes for euermore. How soeuer in this deuise there is not any mention of heires, without which worde an estate of inheritance cannot passe, by any deed or gift made whiles a man yet liueth; yet because in testaments, the wil and the intent 7

k) L. quoniam indignũ. C. de testa. Molin in L. 1. §. eodem. ff. de verb. ob. n. 8. in fin.

l) L. errore. C. de testa.
m) d. L. errore. Ita vt in hoc exemplo non sit necessaria aliqua probatio quòd Scriba errauerat, vel quòd testator omnia nuncupauerat, cùm lex ipsa sit loco probationis. Sich. in d. L. errore. Attamen necesse est probare mulierem istam esse testatoris vxorem, quã vult esse suam executricem. Iason d. L. in fin.
n) L. quoniam. C. de testam.

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of the teſtator is preferred before formal or preſcript wordes, an eſtate of inheritance dooth thereby paſſe, as if he had made expreſſe mentiō of his heires[o]. Other examples to the ſame effect are extant in other places of this booke, which to repeate were ſuperfluous.

o) Supr. eod. part. §. 4.

8 Concerning the laſt queſtion, viz. whether † it be neceſſarie that there be *witneſſes* of a written will; this is the anſwere, that if it be *certaine and vndoubted*, that the teſtament is written or ſubſcribed with the teſtators owne hand: In this caſe the teſtimonie of witneſſes is not neceſſarie[p]: But if it be *doubtfull*, whether the teſtament were written or ſubſcribed by the teſtator; in this caſe the teſtimonie of witneſſes is neceſſarie, to confirme the ſame to be the teſta-

9 tors owne hand[q]. But † it is not inough for the witneſſes to ſay this is the teſtators owne hand, for we knowe his hand[r], neither is it ſufficient (in the opinion of diuers) to bring forth other writings of the knowne hande of the teſtator, and ſo proue the will to bee written or ſubſcribed by the teſtator, by comparing ſuch writings with the teſtament[s]: For the witneſſes may be deceiued (the teſtators hand being eaſie to be counterfeited,) and therefore proofe by ſimilitude of handes is not a full proofe[t], ſauing in thoſe courts where the ſtile or cuſtome doth approoue ſuch teſtimonie for a full proofe[v], or when the teſtament is to bee proued in vulgar forme: neuertheleſſe in this caſe where it is doubtfull whether the teſtator did write or ſubſcribe the teſtament, if the witneſſes doo de-

p) Auth. quod ſine. C. de teſta. & DD. ibid. Io. dilect. de arte teſtādi. tit. 2. c. 2. in fin. Maſcard. de probac. verb. teſtm̄. concluſ. 1352. n. 60. &c.

q) Bar. in L. ſi ita ſcripſero. ff. de cond. & demon. Alex. conſil. 76. vol. 3. n. 2. 3. Pariſ. cōſil. 19. vol. 3. n. 26. Couar. in c. cùm tibi. de teſta. extr. n. 5.

r) Sichard. in d. Auth. quod ſine. Alex. d. conſil. 76. n. 3. 4. Menoch. de arbitr. Iud. q. lib. 2. caſ. 114. n. 22. Afflict. deciſ. 181. n. 7.

s) Sichard. in d. Auth. quod ſine. Alex. d. conſil. 76. vol. 3. Molin. in addic. ad Alex. conſil. 114 vol. 7.

t) Bar. & alii. in L. admonendi. ff. de iureiur. afflict. deciſ. 181. Maſcard. Tract. de probac. verb. comparatio.

v) Veſtrius. pract. cur. Rom. lib. 6. c. 1.

pose that they did see the testator write or subscribe the testament, and being learned knowe the same to be his hande[x], or else that they did heare the testator confesse that he had made his testament, or that the same was in the handes of such a person[y]; or if the testament were found in the testators Chist amongest his other writings: In these cases the proofe made by comparing of handes, albeit the testament be to be prooued in forme of lawe, is a full and sufficient proofe[z]: Or if there be none of these helpes by likely circumstances, yet if on the contrarie there be no suspition of fraud or feare of subornation, I am of their opinion[a] who do hold that the circumspect Iudge may allowe the proofe made by comparing of hands for a full proofe[a]: But then also the writings so found in the testators Chist, must be so written, as it may appeare, not to be a draught or preparation of a will, but the testament it selfe[b].

But what if † the testamẽt be found in the testators Chist, or safely kept amongest other writings, which testament is neither written by the testator, nor by him subscribed, but altogether

x) Sichard. in d. Auth. Alex. d. consil. 76. & consil. 123. vol. 1. n. 5.

y) Bar. Imol. & alij, in L si ita scripsero ff. de cond. & demon. quorũ opinio magis est communis, teste Grasso, Thesaur. com. op. §. Institutio. q. 16. n. 5. & §. testm̃. q. 16. in fin.

z) Natta. in d. Auth. quod sine. Grass. Thesaur. com. op. § testm̃. q. 16. in fin. Mascard. de probac. verb. testm̃. conclus. 1352. n. 66.

a) Alex. consil. 114. vol. 7. n. 4. 5 Natta. in d. Auth. quod sine. et. Grass. Thesaur. com. op. § Institutio. q. 16. n. 6. Dec. consil. 219. in fin. Socin. consil. 162. n. 4. & hanc opinionem ego non falsam, cum Molineo, immo communem, cum Alex. periculosam tamen cum Mascardo: ideoque in arbitrio iudicis positam esse, cum Decio, sentio.

b) Bar. in d. L. quoties. §. 1. ff. de hæred. instituend. Mascard. d. concl. 1352. n. 63. Non tamen opus esse puto, vt seruentur illa requisita, de quibus in d Auth. quod sine, videlicet diei expressionem, extensam scriptionem, liberorum nominationem, &c. Quorum sine obseruatione, nec inter liberos, nec ad pias causas testamentum valet, etiamsi constet de manu testatoris: nam ista requisita inducta sunt à iure ciuili, nec sunt sublata iure canonico, vt author est Euerard. Verum autem, inspecto iure gentium, quo iure nos Angli, haud aliter ac Romani milites, liberè fruimur, non est necessaria vel diei expressio, vel extensa scriptio, &c. Illud solùm exigitur, vt constet scripturam manu testatoris exaratam fuisse, vel subscriptam sine alia quauis solennitate, dum tamen huiusmodi scriptura non sit præparatio ad testandum, sed ipsa dispositio, vt aliàs supradictum est, & infra dicendum part. 7. §. 13. in fin.

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of another mans hand: whether shall this writing preuaile as the last wil and testament of the deceased or not? It shall not [c], vnlesse it be proued that the same was written by the commandement of the testator [d], or vnlesse it be sealed with the seale of the testator [e].

c) Iaſ. in d. Auth. quod ſine. C. de teſta. Iul. Caſar. §. teſtm. q. 14. n. 5. vbi dicunt hanc opinionem eſſe communem.

d) Iaſ. in d. Auth. Maſcard. de probac. d. concl. 1352. n. 67.

e) c. 2. de fide Inſtr. extr. Et licet Decius ibidem teneat contrarium, niſi Sigillationi, accedat etiam ſubſcriptio. Quia tamen hæc opinio fundata eſt in ſolennitate iuris ciuilis, nobis ius gentium attendentibus, opinor hanc Decij ſententiam non audiendam fore in foro noſtro.

Of the forme of a Nuncupatiue testament.

1 *Of the forme of wordes in a Nuncupatiue testament.*
2 *Obſcuritie and ambiguitie to be auoided.*
3 *Obſcuritie what it is, and howe it maie bee auoided.*
4 *Ambiguitie what, and howe it may be auoided.*
5 *The difference betwixt obſcuritie and ambiguitie.*
6 *Willes fauourablie interpreted.*
7 *In contractes interpretation to be made againſt the partie.*

§. xxvj.

1 IN the making of a Nuncupatiue wil or testament, this is chiefly to be obserued, that the testator do name his executor, and declare his minde by wordes of mouth, without writing before witnesses [a]. As † for any precise forme of wordes,

a) §. fin. Inſtit. de teſta. ordin. Auth. hoc inter. §. per nuncupationem. C. eod. tit. numerum tamen ſeptinarium teſtiū. de quo in d. §§. non eſſe neceſſarium ſupra diximus.

none is required [b], neither is it materiall, whether the teſtator doo ſpeake properly or vnproperly [c], ſo that his meaning do appeare, as hath beene heretofore confirmed by diuers examples [d]. But it is not ſufficient for the teſtator to leaue a ſounde in the eares of the witneſſes, vnleſſe he do leaue ſome vnderſtanding alſo of his will and meaning [e].

b) Molineus in L. 1. §. eodem. ff. de verb. ob. n. 8. in fin.

c) L. quoniam indignū. C. de teſta.

d) Supra ead. part. §. 4.

e) L. ſed & ſi. §. proſcribere. de Inſtit. action. L. ætate. §. nihil. de inter. action ff.

And although in written teſtaments it be alſo required, that the wordes and ſentences be ſuch as thereby the teſtators meaning may appeare [f]: yet more ſpecially it is required in a Nuncupatiue teſtament, for more ſupplie may be made in written teſtamentes then can bee made in Nuncupatiue teſtaments concerning the teſtators meaning [g].

f) Supra §. prox. præceden.

g) Auth. quod ſine. C. de teſta.

Wherefore † that the teſtator may the better performe this thing, and that his meaning may be the better vnderſtoode, he muſt as much as he can auoide *obſcuritie*, and *ambiguitie* [h]. 2

h) De obſcuro & ambiguo. vide Spiegel. Lexic. verb. ambiguū. & verb. obſcurum.

Obſcuritie † is auoided by ſpeaking plainly; for an obſcure ſpeech is that which either cannot be vnderſtood at all, or verie hardly by reaſon of the cloudie darkeneſſe therof, or want of the light of plaine vtterance [i]. 3

i) Spie gel. Lexic. verb. obſcurum. Cagnol. in L. ſemper. de reg. iur. ff.

Ambiguitie † is auoided by ſpeaking ſimplie and certainly: for an ambiguous ſpeech is that which yeeldeth diuers ſenſes to the hearer, who remaineth doubtfull in whether ſenſe the ſpeaker is to be vnderſtoode [k]. 4

k) Spiegel. & Cagnol. vbi ſupra.

The † difference betwixt obſcuritie and ambiguitie is this. *By obſcuritie*, the hearer is 5

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made like to him which walketh in a darke place, not knowing where the way lieth, whether on the right hand, or on the left; before him, or behind him; or whether he be in the way, or out of the way: *By ambiguitie*, the hearer is made like vnto him, who walking in the light, meeteth with two or three wayes, and knoweth not which way to take, nor which of thoſe wayes leadeth to that place whereunto hee ought to goe[l]: both of them are to bee auoided.

l) Zaſius in L. veterib⁹. ff. de pactis. Spiegel. & Cagnol. vbi ſupra. Fateor tamen alias ab aliis differentias excogitari, & quandoque etiam confundi.

6 And albeit † the lawe hath prouided fauourable interpretations, to ſuſtaine the teſtament where the diſpoſitiō is obſcure, ambiguous, or vncertaine[m], contrarie to the † nature of contracts, where he that ſpeaketh obſcurely or ambiguouſly, is ſaide to ſpeake at his owne perill, and that ſuch his ſpeeches are to bee taken ſtronglie againſt himſelfe[n]: neuertheleſſe howe fauourable ſoeuer the law be towards dead mēs willes, the lawyers are not ſo fauourable to their clients, and therefore if it were but to auoide long and coſtlie ſuites, it is meete that the teſtator vtter his minde, as plainely and certainlie as he can.

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m) L. in teſtamentis. de reg. iur. ff. & DD. ibid.

n) L. veteribus. ff. de pactis.

Of the particular formes of other testamentes or last willes.

§.xxvii.

CONcerning the formes of testaments priuiledged or not priuiledged, or of other kindes of willes, as of codicils, or of giftes in case of death, I referre the reader to those places where speciall mention is made of euerie of them, and of their differences of formes[a].

a) Supra 1. part. §§.5.6.7.&c.

And chiefly concerning the formes of legacies, I wish the reader to peruse the manifold formes of making an executor: For as I haue often saide[b], by vnderstanding after how many sortes an executor may bee appointed, it is an easie matter to collect how diuersly a legacie may be left also.

b) Supra ead. part. §.3. & §.4.n.18. cum seq.

THE FIFTH PART OF THIS TESTAMENTARIE TREATISE,

WHEREIN APPEARETH WHO may bee Executor, and is capable of a legacie, and who not.

The Paragraphes or Chapters of the fifth part.

WHat persons may bee appointed executors or be capable of a legacie. §.1.
Of an heretike. §.2.
Of an Apostata. §.3.
Of traitors and felons. §.4
Of him that is outlawed. §.5.
Of an excommunicate person. §.6.
Of Bastards. §.7.
Of him that is madde. §.8.
Of an vnlawfull colledge. §.9.
Of a libeller. §.10.
Of vsurers, Sodomites, and other vicious persons. §.11.
Of an vncertaine person. §.12.

WHAT PERSON MAIE BE EXECVTOR OF A TESTAMENT, OR IS CAPable of a legacie.

The fifth part.

Euery one may be executor which is not forbidden.
The teſtator may omit or exclude his owne childe, and make others executors.
The teſtator may make executors either bonde men or free.
Not onely lay men but Clearkes alſo may bee made executors.
Women as well as men may be executors.
Infants as well as thoſe of full age may be made executors.
The teſtator may make his executors either knowne or vnknowne perſons.
The teſtator may appoint executors either one perſon or many.

§. j.

IN the fift principall part of this Testamentarie treatise is declared, what persons may bee appointed executors, and are capable of a legacie, and what persons are incapable of an executorship or legacie.

Wherein forasmuch as the lawe dooth giue libertie to the testator to appoint whom he will to bee his executor [a], and likewise to giue legacies to whom he will, certaine persons excepted [b]: This may be deliuered for a rule, that euerie person may be an executor, and is capable of a legacie sauing such as are forbidden [c]. Now what persons these be which are forbidden, shal streight way bee shewed, after the view of the greatnes of the testators libertie in appointing his executors.

First, it is to be vnderstood that this libertie of the testator is so large & ample, that albeit the testator haue children of his owne, naturally and lawfully begotten, yet by the lawes & customes of this realme, he maie appoint others to be his executors; secretly omitting, or openly excluding his owne children [d].

Secondly, the testator hath libertie to appoint

a) Tit. de hæred. instit. lib. 2. Institut. in princ. Benedict. de Capra. Tract. regul. & fal. verb. executor.

b) §. legari. Instit. de lega.

c) Minsing. in d. tit. de hæred. instit. in prin. pract. Petr. de Ferrar. in forma libelli, ad rend. ration. Tutel. §. an executores n. 1.

d) Bract. de consuetud. & leg. Angl. lib. 2. c. 26. Tract. de repub. Angl. lib. 3. c. 7. vnde perspicuum est, nullum ferè vsum apud nos manere huiusmodi titulorum iuris ciuilis, viz. de exhæredac. liberorum. lib. 2. Institut. de lib. & posthu. hæred. instituend. vel exhæredand. ff & de inoffic. test. ff. Instit. & C. vnà cum pluribus alijs eiusdem farinæ, cùm titulis, tũ legibus.

point executors, not onely those which be free, but also bondmen, or villeines[c], either his owne villeine, or the villeine of another[f]. And if the testator do make his owne villeine executor, he doth manumit, or deliuer his villeine from bondage[g]. And if anothers villeine bee made executor, such villeine may as executor haue action against his owne Lorde, in case he were indebted to the testator[h], because hee shall not recouer the debt to his owne vse, but to the vse of the testator[i].

Thirdly, the testator hath libertie to appoint his executors, not onely laymen, but Clearkes also[k].

Fourthly, the testator may make executors, not onelie men, but also women[l], either single or maried[m].

Fiftly, the testator hath power to appoint executors, not onely persons of ful age, but also infants[n]: and the act done by the infant as executor, as the releasing of the debt due to the testator, or the selling or distributing of the testators goods, is saide to be sufficient[o] in law. And here note, by the lawes of this realme, euery one is accounted infant vntill he be xxi. yeares old[p]. But if the infant be so yong that he hath no discretion (for it is not onely lawfull to make such an one executor, but also the childe in the mothers wombe, and vnborne at the death of the testator[q]) In that case the ordinarie, or other

c) Lib. 2. Instit. tit. de hæred. instituend. in prin. Litleton. tit. villenage. fol. 40. Brook Abridg. tit. villein. n. 68. Et licèt iure ciuili seruus institui quidem potest, non executor, vt per Bald. in L. id quod C. de episcopis & cler. n. 3. Tamen iure quo nos vtimur, institui possunt serui nostrates executores, vt per Litleton & Brook. vbi supra. Quinimo eodem iure ciuili seruus constitui potest nudus executor. Io. de Canib. Tract. de exec. vlt. volunt. part. 1. q. 3. n. 47.

f) d. tit. de hęred. instit. in prin.

g) Io. de Platea. in d. tit. in prin.

h) Litletō. tit. villenage fol. 40. Brook. tit. villein n. 68.

i) Litleton. vbi supra. & sic nota quod nō obtinet ius ciuile, quō seruus alienus institutus acquirat domino. §. alienus. Instit. de hæred. instit.

k) Imo etiam religiosos obtenta licentia Fitzh. tit. execut. n. 47. Brook. eod. tit. n. 63. 77.

l) Couar. in c. tua. de testa. extr. Et est communis opinio. Peckius de testa. coniug. lib. 1 c. 20.

m) Peckius. d. c. 20. Fitzh. & Brook. d. tit. executor. (n) Brook Abridg. tit. executor. n. 115. tit. couerture. n. 56. (o) Brook. vbi supra. & sic non recipitur iuris ciuilis disciplina, quâ minor 17. annis non admittitur executor. (p) Doct. & Stud. lib. 1. c. 21. lib. 2. c. 28. (q) L. placet. ff. de lib. & posthu. quæ lex etsi loquatur de hæredis institutione, idem tamen iuris vel in executoris cōstitutione, passim ab Anglis obseruari notoriè cōstat, quicquid dixerit ius ciuile.

to

to whom the approbation of the testament appertaineth, after the birth of the childe dooth commit the execution of the will to the tutor of the childe, for the childes behoofe, vntill hee be able to execute the same himselfe, the which tutor hath authoritie to deale as executor vntill the childe bee able to vndertake the executorship[r].

r) Quod sine vlla contradictione sæpissimè obseruatur, saltē infra prouinciam Eborac.

Sixtly, it is lawfull for the testator not onelie to appoint his knowne friendes and acquaintance his executors, but also straungers, and such persons as he did neuer see[s].

s) §. fin. Instit. de hæred. instituend. L. extraneum. C. de testa. vide infra ead. part. §. vlt. & intellige vt ibi.

Finally, the testator may appoint one person alone, or manie[t]: manie I say, seueral, or manie representing one bodie, as a Colledge, a Citie, an vniuersitie[v].

t) §. & vnum Instit. de hæred. instituend.

v) L. hæreditatis. C. de hæred. instit. Minsing. in d. §. & vnum. Grass. Thesaur. com. op. §. Institutio. q. 20.

After this view of the greatnesse of the power of the testator in making executors, let vs returne to the restraint of the testators libertie, and shewe what persons are forbidden to be executors, or to reape any commoditie, by a testament or last will.

Of an Heretike.

1 *An Heretike cannot be executor.*
2 *Whether an Heretike may be executor in a militarie testament.*
3 *What if the Heretike do reclaime his heresie.*

§.ij.

AN Heretike can not bee executor; neither is he capable of a legacie[a]: and ſo odious is the crime of hereſie, that albeit the partie bee not yet condemned of hereſie: neuertheleſſe perſeuering in his hereſie, hee is not to bee admitted[b], no not in a militarie teſtament[c], howſoeuer a ſouldier hath more libertie in making an executor then another[d].

a) L. Ariani. C. de hæretic. Sichard. in Rub. de hæred. inſtit. C. n. 5. Minſing. in tit. de hæred. inſtit. lib. 2. Inſtituc. in prin.

b) Vaſq. de ſucceſſ. progreſſ. lib. 1. §. 2. n. 20.

c) L. vlt. C. de hæreticis

d) Supra. 1. part. §. 14.

And albeit he that is named executor, doo repent and reclaime his hereſie, yet being an heretike, either at the time of the making of the teſtament, or at the time of the death of the teſtator, or at the time when hee vndertaketh the executorſhip, he is excluded[e].

e) §. in extraneis. Inſtit de hæred. qual. & differentia.

For this is perpetuall, that if any perſon be incapable, either when the teſtament is made, or when the teſtator dieth, or when hee taketh vpon him the executorſhip, it is as if he were alwaies incapable[f]: but it hindereth not if he be not incapable at other times[g]; neither dooth it hinder the legatarie though he be incapable of the legacy at the making of the teſtamẽt, ſo that he be capable thereof at the time of the teſtators death[h], (as appeareth more at large hereafter[i]) the reaſon of the difference is, becauſe the legacie dependeth of another acte; that is to ſay, of the teſtament, from whence it receiueth his power and vertue, but the teſtament or appointment of the executor dooth not depende of an

f) d. §. in extraneis. L. ſi alienum. §. 1. ff. de hæred. inſtituend. Sichar. in Rub. de teſta. C. in fin Graſſ. Theſaur. cõ. op. §. Inſtitutio. q. 28.

g) d. § in extraneis. L. ſed & ſi. §. ſolemus. ff. de hæred. inſtit.

h) Bar. in L. non oportet. ff. de leg. 2. Peckius Tract. de teſta. coniug. lib. 4. c. 31. Graſſ. Theſaur. com. op. §. Inſtitutio. q. 28.

i) Infr. part. 7. §. 19.

other acte, whereby it may receiue either life or ſtrength[k].

k)Peckius.d.c.;t.

Of an Apoſtata.

§.iij.

AN Apoſtata alſo is incapable of an executorſhip, or legacie[a]: what an Apoſtata is, and how manie kindes of Apoſtacy there be, I haue elſe where declared[b].

That which is heere ſpoken, is ment of Apoſtaſie, properly ſo called, that is to ſay, of backſtarting from the Chriſtian faith[c]: to whome I might ioine alſo Anabaptiſtes, for they are alſo incapable of executorſhips and legacies[d].

a)L.hi qui ſecundum. C.de Apoſta.
b)Supra §.2.§.15.
c)Bar.in Rub. de Apoſta.C.
d)L.vlt. de ſacr. baptiſ. reit.C.Minſin.in.d. tit. de hæred.inſtit.lib.2. Inſtit.in prin.

Of traitors and felons.

§.iiij.

WHoſoeuer is cõuicted of treaſon, or felonie, as he cannot make a teſtament or laſt will, as is before confirmed[a], no more is he capable of anie thing diſpoſed by teſtament or laſt will[b].

a)Supra §§.12.13. part.2.
b)Nam cùm ſit damnatus ad mortem naturalem, mortuo æquiparatur, & ſic non poteſt inſtitui Bar.in L. qui vltimo.ff.de pœnis. & eſt com.op.Graſs.§.Inſtitutio. q.5.Vaſq.de ſucceſſ.pgreſſ.lib.1.§.2.n.13.

Of

Of him that is outlawed.

§. v.

HE that is outlawed, is out of the protection of the prince, & all his goods are forfeited, and is destitute of all the aide of the lawes of this realme[a]: And therefore so long as hee standeth in that case, he is not to be admitted to the executorship, nor can sue for his legacie[b], except it be in such cases as he may make his testament, whereof mention is made before[c].

a) Supra part. 2. §. 21.
b) Fitzh Abridg. tit. admñstr. n. 3. Sed non existimo vtlegatum penitus incapacem reddi, vtpote quem relegato verius quàm deportato, comparandum putem, (nam & relegati bona quandoque publicantur:) sed quia non habet personam standi in iudicio, vtlegatus nõ est audiendus in iudicio durante vtlegatione.
c) Supra d. part. 2. §. 21.

Of an excommunicate person.

§. vi.

ALbeit an excommunicate person may be appointed executor, and is capable of a legacie[a], yet so long as he standeth in the sentence of excommunication, he is not to be admitted by the ordinarie, nor can commence anie suite for his legacie[b].

a) Phil. Franc. in Rub. de testa. lib. 6. n. 32. quæ sententia communiter approbatur, ait Graff. Thesaur. com. op. §. Institutio. q. 4. Bald. in L. id quod pauperibus. C. de episcopis & cler. n. 6
b) c. intelleximus. de iudic. c. post cessionẽ. de probac. extr.

Of Bastards.

1 *Three sortes of Bastardes.*
2 *Incestuous and adulterous Bastardes, are incapable of all testamentarie benefite.*
3 *Diuerse extensions of this former conclusion.*

4 *Diuerse limitations of the same conclusion.*
5 *Difference betwixt the lawes Ecclesiasticall and the ciuill lawe, about the alimentation or nourishment of children, begotten in adulterie and incest.*
6 *Of the lawes and statutes of this realme, concerning Bastards.*
7 *Of Bastardes begotten betwixt single persons.*
8 *Whether the legacie left vnto the Bastard, be presumed to be left for his alimentation or relieſe.*

§.vij.

OF Bastards or children begotten out of matrimonie, there be diuers sorts: some are begotten and borne in *simple fornication*, that is to say, of carnall copulation betwixt single persons, such as at the time of the conception or birth of the childe, may be married together[a]. Some are begotten in *adultery*; that is to say, of such parents, as both, or the one of them being maried to some other at the time of the birth and conception of the child, cannot then marie together themselues[b]. Some againe are begotten in *incest*; that is to say, betwixt such persons as are prohibited to marrie, by reason of Consanguinitie or Affinitie[c].

Bastards begotten and borne in *adulterie or incest*, are not capable of any benefite by the testamēt or last wil of their incestuous or adulterous parents[d], which conclusiō is accompāied with no smal traine of ampliatiōs & limitatiōs[e], of which companie these are not the meanest.

a) Couar. Tract. de matrimonio. 2. part. c. 8. §. 4. Iul. Clar. lib. 5. §. fornicatio.
b) Couar. in d. c. 8. §. 5. Iul. Clar. §. adulterium.
c) Couar. in d. c. 8. §. 5. & 6. Iul. Clar §. incest⁹.
d) Auth. ex complexu. C. de incest. nup. & DD ibid. Couar. de sponsal. 2. part. c. 8. §. 4. Grass. Thesaur. com. op §. Institutio. q. 7.
e) Petr. Duen. Tract. reg. & fal. verb. filius. vbi tradit regulam 14. ampliat. & 11. limitac. illustratam.

The

The first ampliation is, that albeit the incestuous or adulterous father doo name an other person to be his executor, to whom he giueth the residue of his goodes, willing him to restore the same goodes to his incestuous and adulterous childe: this disposition is voide in respect of the Bastard [g]: (neither is the executor bound to restore the same, but may retaine the same to himselfe [h]) for whereof any person is not capable directly or by himselfe, he is not capable thereof, indirectly or by an other [i]: yet I denie not but that the executor maie of his owne liberalitie giue anie goods to the bastard, though not as the gift or goodes of the father [k].

g) Barth. Cæpol. Cautela. 38. verb. quinta.

h) Couar. de sponsal. 2. part. § 5. n. 7.

i) Duen. verb. filius. reg. 366.

k) Cæpol. vbi supra. Io. Dilect. de arte testãdi. tit. 1. cautela 14. n. 8. Couar. vbi supra.

The second ampliatiõ is, that albeit the father should appoint his incestuous or adulterous childe his executor, willing him to bestowe his goodes on such a person, who of likelihoode would neuer demaund the same: as if he should will his executor to giue his goodes to the Emperour, or to the Turke, if hee should in person come into England to receiue the same; this is but a fraudulent cautele, whereby the executor might haue some colour stil to retaine the same in his owne handes [l]: And therefore by reasõ of this fraude the disposition is voide, at least so farre as it dooth respect the benefite of the executor [m].

l) Alex. in L. cogi. §. hi qui solidi. ad Trebel. ff. Cæpol. d. cautela. 38. Io. Dilect. de arte testãdi. d. cautela 14.

m) Bald. cõs. fil. 399. vol. 2. Imol. in L. in tempus. de hæred. instit. ff. Alex. Dilect. & Cæpol. vbi supra.

The third ampliation is, that euen he which is begotten and borne in adulterie, much more he which is begotten and borne in incest, is not onely incapable in respect of his fathers testament, but is also excluded from all testamen-

tarie benefite by his mother[n].

The fourth ampliation is, that the disposition is voide, *ipso iure*, which is made in fauour or for the benefite of incestuous or adulterous bastardes[o].

The fift ampliation is, that although the incestuous or adulterous bastard, be possessed of the thing to him bequeathed; yet he cannot retaine or prescribe the same by that title[p].

The sixt ampliation is, that the adulterous, and especially the incestuous bastarde is excluded, not onely by the ciuill and ecclesiasticall lawes, but also by the lawe of God[q]; but whether this ampliation be true or not, I leaue to the consideration of the reuerent diuines. Diuers other ampliations also there bee of this conclusion[r], which I omit, because they seeme to repugne the lawes of this realme. Nowe to the limitations.

The limitations of the former conclusion are these: First these incestuous and adulterous bastards may be executors vnto anie other person, sauing vnto their naturall parents, and are likewise capable of anie legacie, or deuise bequeathed vnto them by anie other, sauing by their owne parents[s]; euen vnto their incestuous or adulterous brethren, they maie bee executors, or receiue anie other testamentarie benefite from them[t].

The second limitation is, when they are appointed *nude Executors*[u], that is to say, when they doo not reape anie commoditie by the testament[x], for then they may be executors euen

to

n) Couar. Epitom. desponsal. 2. part. c. 8. n. 15.

o) Duen. d. reg. 366. ampliac. 4.

p) Bald. in L. id quod pauperibus. C. de episcopis & cler. per gloss. in L. nemo. ff. de vsucap Duē. d. reg. 366. ampl. 5

q) Augustin vt habet 35 q. 7. c. quid est. Duen. d reg. ampliac. 2.

r) De quibus Duen. d. reg. 366. Barth. Cæpol. cautela. 38. & Io. Dilect. cautela. 14.

s) Gloss. in Authē. quib. mod. na. effic sui. §. fin. Clar. § testm̄ q. 31. n. 4. Panor. in c. cùm haberet. De eo qui dux. in matrimo. quā pol. extr.

t) Duen. verb. filius. reg. 366. limit. 10. Afflict. decis. 96.

v) Simo de Prætis. de Interp. vlt. vol. lib. 5. fol. 17. n. 27. Nec obstat quod dicitur per incapacem nihil posse capi, quia attento iure Can. spurius etiam incestuosus non est omnino incapax, vtpote, cui alimenta licitum est relinquere. Duen. d. reg. 366. limitac 9.

x) Io. de Athon. in legatum. libertatem. de executor. test.

to their owne naturall parents.

Thirdly, by the lawes eccleſiaſticall they are alſo capable of ſo much of that which is bequeathed vnto them by their inceſtuous and adulterous parents, as will ſuffice for their competent alimentation or reliefe[y]: that is to ſay, for their foode, clothing, lodging, and other meete and conuenient neceſſaries[z], according to the wealth and abilitie of the parents[a]. And although the ciuill lawe in deteſtation of this heinous ſinne of inceſt and adulterie, did depriue this inceſtuous and adulterous iſſue, of the hope of all teſtamentarie benefite, though it were left for, and in the name of alimentation, or needfull reliefe[b], the rather by this meane to reſtraine the vnbrideled luſts of ſome, and to preſerue the chaſtitie of others[c]: Neuertheleſſe, foraſmuch as nature hath taught all creatures to prouide for their yong, ſo that the very brute beaſtes haue a naturall care to bring vp whatſoeuer they bring forth[d]: Seeing alſo in equitie the poore infants ought not to be puniſhed (at leaſt not to periſh for want of foode, by occaſion of the fathers faulte, whereof they are altogether faultleſſe[e]:) Therefore the eccleſiaſticall lawe, whereby not only adulterous[f], but inceſtuous[g] iſſue alſo is made capable of ſo much as is ſufficient for needfull and conuenient ſuſtentation, hath preuailed againſt the rigour of the ciuill lawe, and is to be obſerued eſpecially in the eccleſiaſticall Court[h], as more agreeable to nature, equitie, and humanitie. And in this reſpect the lawes and ſtatutes of this realme, in prouiding

y) c. cùm haberet. de eo qui dux. in vx. quam poll. per adult.

z) L. legatis. ff. de alimen. leg. Cætera quę ad diſciplinam pertinent, legato alimentorũ non cõtinentur, niſi aliud ſenſiſſe teſtatorẽ probetur. L. niſi. eod. tit.

a) d. c. cùm haberet. in fin. ſed neque pro neceſſitate tantùm (vt volunt quidam) ſed etiã ad decentiam, conſtituenda ſunt alimenta, ſi modo facultates ſuppetant. Gab. lib. 6. com. concluſ. tit. de alimen. concl. 1. n. 31.

b) d. Auth. ex cõplexu. C. de inceſt. nup.

c) L. iſti quidem. ff. de eo quod met. cauſ. in fin. & §. fin. Inſtit. de noxal. action.

d) Cic. lib. 1. offic. L. 1. §. 1. ff. de Iuſtic. & iur.

e) Deutro. c. 24. verſ. 16. Ezech. c. 18. verſ. 20. L. Sancimus. C. de pænis. L. ſi pæna. cod. tit. diſt. 56. c naſci.

f) Text. in d. c. cùm haberet.

g) Dec. in c. in præſentia. de probac. extr. n. 39. Gabr. vbi ſupra. n. 5. quæ opinio communis eſt contra Bald. in d. Auth. ex complexu.

h) Idem iuris eſt in terris imperij gloſſ. & Panor. in d. c. cùm haberet. Bar. in d. Auth. ex complexu. Deciſ. Neap. 164. n. 2. Dec. vbi ſupra. Duen. verb. filius. reg. 367.

ding aſwell for the conuenient reliefe and keeping of poore and miſerable children, begotten & born out of lawful matrimonie, at the charges of the reputed father or mother[i], (without diſtinctiō whether ſuch infantes were begotten in inceſt and adulterie, or fornication[k];) as for the puniſhment of the mother and reputed father of ſuch vnlawfull iſſue, are worthily commended, although in reſpect of the next limitation following, they may ſeeme not altogether ſo worthie commendation.

i) Stat. Eliz. an. 18. c. 3.

k) Vbi enim lex non diſtinguit, nec nos diſtinguere debemus. L. de precio. ff. de pub. in rem. action.

The fourth limitation is grounded in the lawes of this realme, which doo permit euerie man, both by deede made and executed during their liues[l], and alſo by their laſt willes and teſtaments to be executed after their deathes[m], to giue & to deuiſe vnto anie their baſtards without diſtinction, all their lands, tenements, or hereditaments, without reſtraint, at the leaſt more then wil ſuffice for their ſuſtentation, and much more then they are worthie of. Which thing cannot but redounde to the great preiudice of right heires, conſidering the daunger whereunto lawfull children are ſubiect, and which they doo manie times ſuſtaine, through forcible flatteries of vile diſſembling harlots, no leſſe voide of all modeſtie, then full fraught with all kinde of ſubtiltie, with whoſe ſweete poiſon and pleaſant ſting manie men are ſo charmed and inchaunted[n], that they haue neither power to hearken to the iuſt petitions of a vertuous wife, praying and crauing for her children, nor grace to denie the vniuſt demaunds of a vicious and a ſhameleſſe

l) Perkins. tit. graunts. fol. 11. Bract. lib. 2. c. 7.

m) Perkins. tit. deuiſe. fol. 98.

n) Videas c. 5. Prouerb. Salom.

ſhameleſſe whoore, prating and grating for her baſtardes; neuer remembring that when Sara ſaid to Abraham: *Caſt out this bonde woman and her ſonne, for the ſonne of this bond woman ſhall not be heire with my ſonne Iſaak.* Abraham by thé commaundement of God hearkened to the voice of Sara [o], neuer once regarding (that which diuers haue diligently noted;) that the brood of baſtardes are commonly infected with the leproſie of the Sires diſeaſe [p]: and being encouraged with the example and patterne of their fathers filthineſſe, they are not onely prone to follow their ſinfull ſteppes [q], but do ſometimes exceede both them and others in all kinde of wickedneſſe.

The fift limitation is in the baſtardes of kings and princes, for a king may *ex plenitudine poteſtatis*, make his vnlawfull iſſue capable of whatſoeuer by will deuiſable hee dooth giue or bequeath vntohim [r].

The ſixt limitation is this, the adulterous grandfather may bequeath anie thing to the lawfull children of his owne vnlawful ſons or daughters, or make them his executors [s]; but ſo cannot the inceſtuous grandfather [t].

The ſeuenth limitation is this, that the teſtator may bequeath vnto his inceſtuous or adulterous daughter a competent portion for her dowrie, or preferment in mariage: for this is accounted all one, as if he did bequeath it vnto hir for hir alimentation [u].

The eight limitation is this, that an executor may make the teſtators baſtard his executor [x].

o) Gen. c. 19.

p) c. ſi gens Anglorum, & ibi præpoſ. diſtinct. 56. Hinc eſt (ait Peckius) quod Sodomitarũ vnà cum parentibus, paruulos etiam cœleſti igne conſumpſit Dominus, nempe quòd proſpexerat paruulos hos idem flagitium admiſſuros. Pec. in c. non decet. de reg. iur. 6.

q) Mali corui malũ ouum, & metuẽda ſunt paterni criminis exẽpla L. quiſquis. C. ad L. Iul. maieſt. §. 1.

r) Boer. Deciſ. 127 n. 17. Duen. d. reg 366. lim. 7.

s) Iaſ. in L. hæreditas. C. de his quibus, vt indig. n. 7. & 8. Cui opinioni locum concedere, etiamſi hic Auº habeat legitimos filios. Cùm apud nos nulla ſit neceſſitas inſtituendi ſuos, vt ſupra ead. part. §. 1.

t) Bald. in L. ſi quis inceſtus. C. de inceſt. nup. Couar. in d. c. 8. de ſpõſal. 2. part. §. 5. n. 13.

v) Panor. in d. c. cũ haberet. n. 5. Bar. in d. Auth. ex complexu, quæ concluſio ampliatur per Petr. Duen. verb. filius. reg. 367. ampl. 3.

x) Bar. in L. ſi his. ff. de vulg. ſub. Bald. in L. eã qua. C. de fideicommiſ. n. 4. Clar. § teſtium. q. 31. Intellige tamen niſi coniecturæ interuenerint, ex quibus fraus præſumatur. Graſſ. §. Inſtitutio. q. 7. n. 13.

The ninth limitation is, when the adulterous parents doo ſolemnize lawful matrimonie together before the birth of the childe[y]: for example, A married man doth beget a ſingle woman with childe (for this is adulterie by the laws eccleſiaſtical of this realme[z], although by the ciuill lawe it is but fornication[a]) immediatelie after his wife dieth, after whoſe death he marieth the woman (for ſo he maie[b]) after the mariage the child is borne: In this caſe the childe is not onely capable of anie teſtamentarie benefite, but is reputed a lawfull childe, and not a baſtarde[c], as heeretofore hath beene diſputed more fullie[d].

Concerning thoſe baſtards which are begotten of ſingle perſons, ſuch (I meane) as may lawfullie marrie together, then in caſe the mother were *a maide, or an honeſt widdow*, immediatelie before ſuch vnlawfull copulation and cõception of the childe: This kind of fornication is tearmed *Stuprum*[e], and this kinde of baſtarde ſeemeth to be in the ſame caſe as if he had bene begotten in adulterie.

If the mother were *an harlot* before the conception of the child, howſoeuer by the ciuil law ſuch a baſtard is not incapable of any teſtamẽtarie benefit[f]; yet forasmuch as by the lawes eccleſiaſticall[g] and ſtatutes of this realme[h], ſuch copulation is condemned as vnlawfull, and to be puniſhed as vngodly: I ſuppoſe that this kinde

y) Præpoſ. in c. tanta vis. Qui filij ſunt legitimi. extra. n. 10. Card. eod. c. n. 7. Melch. Kling Tract. de cauſ. mrion. fol. 85. 86.

z) Card. præpoſ. & alij, in d. c tanta vis. Kling. vbi ſupra. c. nemo. 32. q. 4. Panor. in c. tranſmiſſæ de eo qui cog. conſang. vx. extra. Clar. §. adulterium. n. 2.

a) L. 1. C. de adul L. inter liberos. ff. ead. Clar. vbi ſupra.

b) Niſi præter copulam mortis machinatio interueniſſet, vel fides data fuiſſet, quia tunc non valet inter eos matrimonium iure cã. c. ſuper hoc c. ſignificaſti de eo qui dux. in matr. quam poſſ. per adul. extr. ſed an diſſõlui poſsint hodie nuptiæ huiuſmodi, multum dubito, occaſione ſtatuti H. 8. an. 32. c. 38.

c) d. c. tanta vis. & DD. ibidem.

d) Supr. part. 4. §. 15. (e) c. 8. §. 5. n. 15. 16 17. (g) 18. c. 13. L. inter liberos. L. ſtuprum ff. de adul. (f) Couar. de ſponſal. 2. part. c. Nemo. 32. q. 4. Panor. in Rub. de adul. extra. (h) Stat. Eliz. an.

of

of baſtarde is no more capable of an executorſhip or legacie, then if the mother had bene honeſt before[i], eſpeciallie if the mother were a common harlot, the teſtator neuertheles eſteeming hir to be cleare from pollution with anie other, and himſelfe onely to be the vndoubted father of the childe, whom hee dooth make his executor, or to whom he dooth bequeath anie legacie by the name of his childe, when as indeede he is not the certaine father of the childe, the mother hauing proſtituted hir ſelf to the filthineſſe of others alſo. For in this caſe euen by the ciuill lawe, the Baſtarde cannot be executor, nor obtaine the legacie[k], if not by occaſion of the fathers crime, yet by reaſon of the teſtators errour and follie, who of all likelihood woulde neuer haue made that childe executor, nor haue ſhewed himſelfe ſo good a father if hee had knowen the bad conditions of the mother. Where it is ſaide that the parentes maie bequeath ſo much to their baſtardes as will ſuffice for their alimentation or reliefe, what kinde of Baſtardes ſoeuer they bee without diſtinction: It maie bee demaunded not impertinently, nor vnprofitablie, What if the teſtator doo ſimplie bequeath a ſumme of money or ſome other thing to his vnlawfull childe, not making any mention that hee dooth bequeath the ſame for the childes reliefe or alimentation: Whether in this caſe is it to bee preſumed that the father did meane it for the childes alimentation or no: but if hee did ſo meane, the legacie is good, otherwiſe it is voide. Briefly, how-

i) Videas Couar. in d. §. 5.

k) Bald. in L. quiſquis ad L. Iul. C. de adult. Graſſ. Theſaur. com. op. §. Inſtitutio. q. 7. n. 10. & infr. part. 7. §. 5.

howsoeuer in this matter al men are not of one minde, I doo rather subscribe to their opinion, who do hold the affirmatiue[1].

l) Aymo. Grauetta cõsil. 219. n. 8.

Of an vnlawfull Colledge.

1 *An vnlawfull Colledge cannot be executor.*
2 *What is vnderstoode by an vnlawfull Colledge.*
3 *Whether the Churchwardens may sue for a legacie left vnto the Church.*
4 *Particular persons of an vnlawfull Colledge may be appointed executors.*

§. ix.

AN vnlawfull Colledge cannot bee executor[a]: By an vnlawfull Colledge in this place, I meane al companies, societies, fraternities, and other assemblies whatsoeuer, not confirmed nor allowed for a lawfull corporation by auctoritie of the prince, or of som other by whom they ought to bee confirmed or allowed[b]. Notwithstanding, if the testator bequeath anie goods or money to the parishiõers of any parish to the vse of the Church, such a bequest is good[c], and the legacie maie be recouered by the Churchwardẽs, who albeit in euerie respect they bee not a lawfull corporation, yet in this respect they bee accounted a lawfull corporation, I meane in fauour of the Church[d]: or if the seuerall and particular persons of an vnlawfull Colledge bee appointed executors,

a) L. collegium. C. de hæred. instit.

b) d. L. collegium. Bar. in L. cum senatus de reb. dub. ff. Abbas in c. dilecta. de excess. præla. extr.

c) Lambert. Tract. de offic. gardianorum. fol. 43 Brook. tit. corporation. n. 55. 73. 77. 84. tit. done. n. 17. 50. contra Fitzh. tit. done. n. 1.

d) Lambert. vbi supr.

executors, they are not to be repelled [e].

e) Paul. de Castro. in L. cum senatus. ff. de reb. dub.

Of a libeller.

§. x.

HE that is condemned for a famous libell is inteſtable, both actiuely and paſſiuely: that is to ſay, he can neither make a teſtament, nor receiue anie benefite by a teſtament [a].

a) L. is cui. §. vlt. ff. de teſtam. Vaſq. de ſucceſ. progreſſ. lib. 1. §. 2. n. 18.

Of vſurers, Sodomites, and others.

1 *Manifeſt vſurers & Sodomites, can neither make a teſtament, nor reape any benefite by anothers teſtament.*

2 *Whoſoeuer is forbidden to make a teſtament by reaſon of ſome crime, the ſame perſon is incapable of anie benefite by the teſtament of another.*

§. xi.

AS manifeſt vſurers, Sodomites, and other criminous perſons, are forbidden to make teſtaments themſelues, or to diſpoſe their goods by their laſt willes (as is before at large declared [a];) ſo are they forbidden to reape any ſuch benefite by the teſtament of others: for this is a commō receiued concluſion, that hee that cannot make a teſtament or laſt will, by reaſon of ſome crime by him cōmitted, the ſame perſon is incapable of

a) Supr. part. 2. §§. 15. 16. 17. 18.

of any legacie of goodes, disposed by the testament or last will of another [b].

b) Gloss. in L. is cui ff. de testa. Soarez. lib. rec. Sen. verb. testm. n. 82. referens hanc op. esse com. Idem Iul. Clar. §. testm. q. 43. n. 2.

Of an vncertaine person.

1 *If the testator make Iohn at Stile his executor, and there be two persons of that name, neither of them is to be admitted.*

§. xij.

AN vncertaine person cannot bee executor nor legatarie [a]: For example, the testator dooth make Thomas Lante his executor, to whom also he giueth all his goodes: and there be two persons either of them being called Thomas Lante: In this case neither is to be admitted [b].

a) §. incertis. Instit. de lega. Io. And. Gem. & Franc. in c. si pater. de testam. 6.

b) Minsing. in d. §. incertis. per L. si quis. §. si inter. de lega. 2.

Diuers other examples of vncertaintie, with diuers declarations of euerie example, doo appeare in the last parte of this booke, where the reader maie bee more fullie satisfied [c], in what sorte this former conclusion is to be admitted.

c) Infr. part. 7. §. 6. cum seq.

THE

THE SIXTE PART OF THIS TESTAMENTARIE TREATISE,

WHEREIN IS DESCRIBED THE office of an Executor.

The Paragraphes or Chapters of the sixt part.

OF the office of an executor. §.1.
Of accepting or refusing the executorship: And first whether the executor may be compelled to accept the same. §.2.
What is to be considered of the executor, desirous to be resolued, whether it were better to accept, or to refuse the executorship. §.3.
Of the time which the executor hath to deliberate, whether he will vndergo the executorship. §.4.
Of the office of an executor testamentarie, vndertaking the executorship. §.5.
Of diuerse questions about the making of an inuentarie: And first whether it be of necessitie that an inuentarie be made. §.6.
What things are to be put into the inuentarie. §.7.
Within what time the inuentarie is to be made. §.8.

Of

Of the forme to bee obſerued in the making of an inuentarie. §.9.
Of the effect and benefite of an inuentarie. §.10.
Of the probation and approbation of teſtaments: and namelie before whom the ſame are to bee prooued. §.11.
By whom the teſtament is to be prooued. §.12.
When is the teſtament to be exhibited & proued. §.13
Of the maner or forme of prouing and approuing teſtaments. §.14.
What fees are due about the probation and approbation of teſtaments. §.15.
Of the paiment of debtes, legacies, and mortuaries. §.16.
Of the making of an account; and firſt of the neceſſitie thereof. §.17.
To whom the account ought to be made. §.18.
Of the time of making the account. §.19.
Of the maner of making an account. §.20.
Of the ende and effect of an account. §.21.
Of the executor refuſing the executorſhip, and what he is to take heede of. §.22.

Of

OF THE OFFICE OF an executor.

The sixt part.

1 *Three kindes of executors.*
2 *Executor by the lawe.*
3 *Executor by the Ordinarie.*
4 *Executor by the testament.*
5 *Diuerse kindes of executors testamentarie.*
6 *The office of an executor testamentarie.*

§. i.

NOwe followeth the sixt principall parte of this Treatise, wherein I promised to set foorth the office or duetie of an executor, I meane of an executor Testamentarie: that is to say, of him that is appointed by the testator for the performance of the will.

1 For thou shalt vnderstand that there bee †

three kindes of executors, or persons which haue to deale with the execution of dead mens willes, and disposition of their goodes [1], euerie of which haue their seuerall offices. The first hath his auctoritie *from the lawe*, the second *from the Ordinarie*, the third *from the testator*[b].

The † executor which deriueth his authoritie from the lawe, is the Bishop or Ordinarie of euerie dioceſſe, vnto whom the execution of testaments and last willes, especiallie *ad pias causas*, (no executor being appointed by the testator) hath apperteined and belonged [c], and that not of late time (as some haue lately diuined, or rather dreamed) but euer since Christianitie was first receiued, and established by emperiall auctoritie, or verie shortly after: nor within this realme of England only, where the bishops to whom the approbation of testaments apperteine [d], haue continuallie by the roiall consent of the godly kings and princes of this realme [e], exercised this office, and executed this charge, for, and during so long time, and so manie ages, that (if I be not deceiued) there is not anie memorie or ancient recorde to the contrarie [f], (I meane since Christianitie was first embraced, and Paganisme abolished:) but also throughout all the kingdomes and nations within the Christian Empire. For not onelie by the lawes ecclesiastical [g], vsed and obserued for many hundred of yeares, but also by the ciuil law [h], composed aboue a full thousand yeares since [i],

2

a) Specul. de Instr. edit. §. nunc vero aliqua. in prin.

b) De hac trimembri executoris diuisione in legitimum, datiuum, & testamentarium. Specul. vbi supra. Cui adiungas velim Io de Canibus. Tract. de executorib. vlt. volunt. part. 1. q. 3. n. 22. fol. mihi. 120.

c) L. nulli. L. si quis ad declinand. C. de episcopis & cler. c. tum nobis. c. nos quidem. c. Io de Testa. extr. c. statutū. de testa. lib. 3. prouincial. cōstit. Cant c. statuimus. eod. tit. lib. constit. prouinc. Ebor.

d) Lindw. in d. c. statutum. & in c. ita quorundam de testa. lib. 3. prouincial. constit. Cant. Io de Athon in legatin. libertatem. de execut. testa. Doct. & Stud. lib. 2. c. 28.

e) c. accidit de immunitate ecclesiasticarū libertatum. lib. 3. prouin. constit. Cant. Lindw. in d. c. statutum. verb. ecclesiasticarum libertatum.

f) Lindw. in d. c. accidit, qui etsi antiquus sit, non potuit tamē huius antiquitatis initiū inuestigatione assequi, nempè cuius regis temporibus istud primo fuerat concessum, vt ille ingenuè fatetur.

(g) c. tua. c. nos. c. Io. de testa. extr. (h) L. nulli. L. si quis ad declin. C. de episcopis & cleric. (i) Anno viz. Christi 536. editus est ille Iustiniani codex, in quo leges istæ inter alias inseruntur.

this

this office and charge of executing the aforesaide testaments and last willes hath beene imposed vpon the reuerend Bishops: in the sinceritie of whose consciences all Christian lawes and namely the lawe of this land, hath reposed greater confidence then in other lay people, about the performance of deade mens willes [k]. Hence it is, that euerie Bishop is called *Ordinarie*, as if other Iudges were in this behalf incompetent or extraordinarie [l]: Hence also is it that the Bishop is called *Executor legitimus*, Legall executor, because he onely is appointed executor by lawe, where no executor is appointed by the testator [m].

k) Perkins in tit. de testamentis, fol. 94.

l) Ordinarius verò dicitur, qui lege, vel consuetudine, vel principis beneficio iurisdictionem vniuersaliter exercet. DD. in L. more de iur. om. iudic.

3. The executor † which deriueth his authoritie from the Bishop, or Ordinarie, is he whome we call Administrator [n]: For when the executor named in the testament, dooth refuse to be, or cannot be executor; or when no executor is named in the will; it is lawfull for the Bishop or Ordinarie to commit administration [o], and to annex the wil to the letters of administratiõ [p]. And this administrator hauing his aucthoritie from the Ordinarie, is chargeable with the performãce of the will, as if he had bene appointed by the testator [q], and is called in lawe, *Executor datiuus* [r], because he is giuen or assigned by the Ordinarie, to whom originallie and by law this execution doth appertaine: But with vs he is vsuallie called *Administrator* [s], because hee is the Ordinaries deputie, or as it were his steward or bailife, to deale and to administer in steade of the Ordinarie; and in that respect the Ordina-

m) Specul. in d. §. nunc verò aliqua de Instr. edit. Io. de Canib. de exec. vlt. vol. part. 1. q. 3. Olden. de execut. vlt. vol. tit. 2.

n) Specul. vbi supra.

o) Stat. Ed. 3. an. 31. c. 11 & stat. H. 8. an. 21. c. 5.

p) Brook Abridg. tit. testament. n. 20.

q) Brook Abridg. tit. deuise. n. 35. stat. Ed. 3. an. 31. c. 11.

r) Specul. in d. §. nunc. verò aliqua. de instr. edi. Io. de Can. & Oldē. Tract. de executore.

s) Stat. Ed. 3. an. 31. c. 11. & stat. H. 8. an. 21. c. 5.

rie may cal this his administrator to an accoũt [t], and if he will, may at anie time reuoke his office or administration, like as anie other man maie reuoke his attorney [v].

The executor † which deriueth his auctho- 4
ritie from the testator, is he that is named executor in the testament, or to whome the execution of the testament is committed by the dead man: For it is lawfull for euerie one hauing authoritie to make a will, to appoint an executor for the performance of the same will [x]. This executor is tearmed *Executor testamentarius*, a testamentarie executor [y], & hath his auctoritie immediately from the testator [z], representing the person of the dead man [a], and may without the auctoritie of the Ordinarie, enter to the testators goodes and cattels [b], and maie bee conuented by the creditors and legataries of the deceased, as else where is declared [c]: And after the probation of the testament, maie also commẽce sute against the testators debtors [d], & doth not much differ frõ him in nature, whose name in the ciuil lawe is *hæres* [e], sauing that *hæres* by the ciuil law, is to haue the residue of the testators goods, & maie cõuert the same to his own vse, (the funeral, dets & legacies discharged,) albeit the testator do not expresly wil that he shal haue the same [f]: where as an executor may not cõuert the residue to his own priuate vse [g], nor anie part of the testators goods, more then that which is left vnto him by the testator, or which the Ordinarie shall allowe him for his trauaile and

t) Stat. Ed. 3. an. 31. c. 11.
v) Brook. tit admñstr. n. 3. & n. 33. fz. si statutum 21. Hen. 8. non obstat quod quære, et tamen videtur quod ex iusta causa poterit reuocari vt in casu Caroli ducis Suffolciæ. 5. Edw. 6. non tamen pro suo libito.
x) Supra part. 5. §. 1.
y) Specul. in d. §. nunc verò. & Io de Can. ac Io Old. de execu. vlt. vol.
z) Plowd. lib 1. in cas. inter Greisb. & Fox.
a) Sichard. in Rub. de iur. delib. C. n. 1. Minsing. in tit. de hæred. instituend. Instit. lib. 2. Zas. in L. si res. ff. de excep. & prciud. Doct. & Stud. lib. 2. c. 7.
b) Plowd. d. cas. inter Greisb. & Fox.
c) Supra part. 4. §. 2. & infra hac parte §. 3.
d) Perkins. tit. testament. fol. 93. Brook. tit. executor. n. 49.
e) Specul. de Instr. edit. §. nunc verò aliqua. n. 16. Lindw. in c. statutũ. lib. 3, prouincial. const. Cant. verb. prius. Tract. de repub. Angl. lib. 3. c. 9. Haddon lib. refor. leg. eccles. Angl. tit. de testa. c. 1. c. 18. Adde quæ superiùs adnotaui part. 4. § 2. in princip.
f) L. 3. C. de testam. mil. §. hæreditas. Instit. de hæred. instituend. L. interdum. ff. de hær. instit. Lindw. in d. c. statutũ. verb. effect°. in fin
g) Magna charta. c. 18. Plowd in c. inter Norwood. & Rede. Perkins tit. deuise. c. 8. fol. 97. Litleton. fol. 40. Ripa in L. cùm filius famil. ff. de leg. 1. n. 21.

charges,

charges, or for ſome other cauſes hereafter expreſſed[h]: Inſomuch that if the executor die inteſtate, the teſtator alſo from that time ſhall bee deemed inteſtate, and adminiſtration maie bee committed in this caſe of the goods not adminiſtred[i].

h) Text. in d.c. ſtatuimus. Dom. Gem. in c. religioſus. lib. de teſta. 6.n.9. Doct. & Stud. lib.2.c.10. Dyer.fol.2. & infr. ead. part.§.3. n.14.

i) Brook. Abridg. tit. admiſtr. n.1.41. tit. exec. n.149. Plowd. in caſ. inter Gresb. & Fox.

Concerning the office of him that is appointed executor by lawe, that is to ſay, of the Biſhop or Ordinarie: and likewiſe concerning the office of the executor appointed by the Ordinarie, that is to ſay, of the adminiſtrator: I doo not heere purpoſe to entreate, but only of the office of an executor teſtamentarie.

5 Of † executors teſtamentarie there bee diuerſe kindes; that is to ſay, ſome be *nude executors*, ſuch as do reape no commoditie by the teſtament[k]: others not meere or naked executors, but are to receiue ſome benefite thereby, and may commence iudiciall action[l]; and againe, of executors ſome be *vniuerſall*, and ſome *particular*[m]: But becauſe I ſee no great vſe of theſe diſtinctions here in this place, I ſhall ſpeake of an executor teſtamentarie generallie, and as it is agreeable to euerie teſtamentarie executor, bee hee *nude or other wiſe*, vniuerſall or particular[n].

k) DD. in L. ſi quis. de leg. 2. ff. Io. de Athon. in legatin. libertatem. de executor. teſtam.

l) Conſule Bald. in d.L. ſi quis. vbi docet executorem dici poſſe nudum, duplici reſpectu, vel ob defectum cõmodi, vel ob defectum actionis.

m) Olden. Tract. de executor. vlt. vol. tit. 3. & ſupr. part. 4 §. 18. Bar. in L. à filio. ff. de alimen. leg.

n) De officio executoris in genere, deinde de officio executoris teſtamẽtarij, legitimi datiui in ſpecie. Vide poſt alios Io. de Canib. de executor. vlt. volunt. 2. part.

6 The † office of euerie executor teſtamentarie cõſiſteth in two things: the firſt is, *in accepting or refuſing the executorſhip*[o]. The ſecond dependeth of the reſolution of the executor in accepting or refuſing the executorſhip. For if hee doo accept of the executorſhip, then his office is extended diuerſly, but eſpeciallie it conſiſteth

o) Vide Sichar. in Rub. de iure delib. C. & infr. ead. part. §§. 2. 3. 4.

in *making of an inuentarie*[p], *in procuring the probation and approbation of the testament*[q], *in the payment of debts and legacies*[r], *and finallie in the making of an account*[s]. But if he resolue to refuse the executorship, his office is so much the lesse, consisting onlie in the *auoiding* of such things whereof mention is made hereafter[t].

p) Infr. ead. part. §. 6.
q) Infr. ead. part. §. 11.
r) Infr. ead. part. §. 16.
s) Infr. ead. part. §. 17.
t) Infr. ead. part. §. 22.

Of accepting or refusing the executorship: and first whether the executor maie be compelled to accept the same.

1 *Diuerse questions about the accepting or refusing of the executorship.*

2 *The executor may be cited to accept, or to refuse the executorship.*

3 *If the executor being cited will not appeare, the Ordinarie may commit the administration of the goodes of the deceased.*

4 *If the executor named refuse the executorship, the ordinarie may commit the administration.*

5 *The executor cannot be precisely compelled to vndertake the executorship.*

6 *What if he haue alreadie medled with the goods of the testator.*

7 *Whether the executor refusing the executorshippe, shall loose his legacie giuen vnto him in the same testament.*

§.ii.

1 Oncerning† the accepting or refuſing of the executorſhip, three queſtions maie bee demaunded: Firſt, whether hee that is named executor in the teſtament *may be compelled* to vndertake the executorſhip, or that it is in his power to refuſe the ſame[a]. Secondlie, *what is to be conſidered of him that is named executor, whereby he maie be reſolued whether it were better to accept or refuſe the executorſhip*[b]. Thirdly, *how long time*, he that is named executor, hath to deliberate and determine of accepting or refuſing the executorſhippe[c].

a) De hac Q. conſulas Henr.Boic.in c.tua nos.de teſta.extr.Panor.in c.Iohannes. eo. tit.& Bar.in L.1.de.leg 2.ff.

b)Infr.§.prox.

c)Infr.ead.part.§.4.

2 To the firſt it maie bee anſwered, that hee† that is named executor, maie bee cited to appeare before the Ordinarie, or other hauing authoritie to proue the will, and there either to accept the executorſhip, or at leaſt to refuſe the
3 ſame[d]. And in caſe† either he will not appeare,
4 or appearing† refuſe to proue the teſtament, the Ordinarie or other Iudge maie commit the adminiſtration of the goods of the deceaſed, as if hee had died inteſtate[e]; and the adminiſtrators haue action and may adminiſter the goods of the deceaſed, as if he had died inteſtate, and their authoritie or act done is good and effectuall in the lawe[f] in the meane time, vntill the executors vndertake the executorſhip[g], for then the Ordinarie maie reuoke the adminiſtration before by him committed[h].

d)Boic.Panor.& Bar. vbi ſupra Plowd.in caſu inter Greisb.& Fox.

e)Brook Abridg.tit. adminſtr.n.32.tit.exec. n.49.102.ſtat.H.8. an.31.c.5.

f)Brook vbi ſupra.& Plowd.vbi ſupra.

g)Bald.in L.deberi. C. de fideicommiſſ.liberta.Plowd.in d.caſ.inter Greisb.& Fox.

h)Brook Abridg.tit. adminſtr.n.33.quod facilius procedit, cum adminiſtratio commiſſa fuerit (vt ſæper ſolet) ſaluo iure cuiuſcunque &c.

But he † that is named executor, cannot be 5
precisely compelled to stand to the will and vn-
dertake [i] the executorship, vnlesse † hee haue al- 6
readie medled with goodes of the testator, as
executor, for then he is not only to be cõpelled
to performe the office of an executor [k]; but also
if he should refuse, and the Ordinarie commit
the administration vnto him : this refusall is
void, and he shall be charged as executor [l].

Moreouer, albeit † the executor named, who 7
hath not medled with the administration of the
goodes of the deceased, cannot be precisely or
absolutely compelled : yet if anie legacie bee
left vnto him in the testament, he maie be com-
pelled to stand to the executorshippe, or else to
loose the legacie : so that he shall not reape the
benefite, if being duely admonished, he refuse
the burthen [m].

i) Panor. in c. Io. de testa. extr. n. 3. Olden. de exec. vlt. volunt. tit. 7. in fin.

k) Panor. & Olden. vbi supr. Boic. in c. tua. de testa. extr. Plowd. in cas. inter Greisb. & Fox.

l) Fitzh. Abridg. tit. execut. n. 35.

m) Quæ positio locum vendicat, etiamsi executor sit coniuncta persona, vt habet communis opinio. Gribald. Thesaur. com. op. verb. tutor. Rom. consil. 235. Adde Io. de Canib. d. Tract. de executore. vbi plures enumerat huius regulæ limitationes, nempè quod non est compellendus, quarum firmitatem, quia suspectam habeo, eas silẽtio prætereo.

What is to be considered of the executor, desirous to be resolued whether it were better to accept or to refuse the executorship.

1 *Diuerse things to be considered of him which would be resolued, whether it were better to accept or to refuse the executorship.*

2 *The first thing to bee inquired in this case concerning the testator.*

3 *Of the auctoritie and charge of the executor.*

4 *The executor may not medle with the landes, tenements or hereditamẽts of the testator, but the heire.*

5 *The*

5 The heire hath not to deale with the goods and cattels of the testator, but the executor.

6 The testator may giue power to his executor to sel his landes for paiment of his debts, or other purpose.

7 What if some of the executors named do refuse, whether may the rest sell the lands according to the testament.

8 Whether the executor of him that had lands in fee simple, fee taile, or for tearme of life, maie recouer the rents, fee fermes, or other arrerages against the tenant which ought to haue paied the same in the life of the testator.

9 The second thing to be required concerning the testator.

10 Of the authoritie and charge of the executor of an executor.

11 Whether diuerse being assigned executors, whereof some be dead, the executor of the executor deceased may bee ioined in action with the executor suruiuing.

12 Of the authoritie and charge of the executor of an Administrator.

13 What is to be considered about the last will of the testator.

14 Whether the executor maie conuert the residue to his owne vse.

15 Whether he that is named executor, shall lease his legacie if he do refuse the executorship.

16 What is to be considered in the person of the executor.

17 What is to be considered in a wife executrix.

18 What is to be considered in the person of the coexecutor.

19 *Whether one executor maie preiudice another.*
20 *Whether one executor maie ſue another.*
21 *VVhether one of the executors maie alone ſell the goodes of the teſtator.*
22 *VVhether the coexecutor after refuſall, maie meddle as executor.*
23 *VVhat is to bee conſidered in other perſons with whom the executor is to deale.*

§.iij.

HE † that is deſirous to be reſolued whether it were better for him to vndertake the executorſhip, or to refuſe the ſame, muſte conſider diuers things, whereof ſome concerne *the teſtator*; ſome concerne *the executor him ſelfe*; and ſome concerne the *perſons of others*[a]. 1

Of thoſe things which concerne *the teſtator*, the firſt and principall thing to be regarded in this conſultation, is his ſubſtance or wealth.

Firſt of all therefore † it behoueth him that is named executor, to enquire diligently, and to learne certainly (if he can) what goodes and cattelles did belong to the teſtator at the time of his death[b], and what debtes were then due vnto him: And on the contrarie, what debts he the ſaid teſtator did owe vnto other men[c]. 2

For † as the executor may enter to all the goodes and cattels which did belong vnto the teſtator[d], and were in his poſſeſſion at the time of his death[e], and hath action againſt euerie debtor of his teſtator[f]: So ſhall euerie one, to whom 3

a) Hæc & alia quæ ab executore deliberante conſideranda ſunt, traduntur à Io de Canib. in Tract. de executor. vlt. vol. 2 part. q. 1. cum ſeq. Cui, ſi placeat, adiungas Sichar. in Rub. de iure de lib. C.

b) Sichard in d. Rub. de iure de lib. C.

c) Cuius rei vtilitas ſtatim ſubijcitur.

d) L cùm hæredes de acquir. poſſ. L. hæreditas. de reg. iur. ff. Plowd. in caſu inter Greisb. & Fox.

e) Cagnol. in L. in præcibus. C. de impub. & alijs. ſub n. 278.

f) Inſtit. de perpet. & temp. action. Terms of law. verb. executor.

whom the teſtator was indebted, haue action againſt the executor (eſpecially hauing an obligation or other ſpecialtie) ſo farre as the goods of the teſtator will extend [g], and ſo long as the executor hath aſſets in his hands [h]: howbeit, where anie debt is due to the teſtator, this ſhall not charge the executor as aſſettes, becauſe it is a thing in action, and not in poſſeſſion [i]: which concluſion is very reaſonable, when as the executor hath vſed ſuch diligence for the recouerie thereof, that he cannot be iuſtly charged or woorthily blamed for not hauing the ſame in his owne hands [k].

4 As † for landes, tenements, and hereditaments of the teſtator, they ſhall deſcende to his heire, and ſhall not come to the executor: For 5 by the lawes of this realme, as †the heire hath not to deale with the goods and chattels of the deceaſed [l], no more hath the executor to doo with his lands, tenements, and hereditaments [m]. Albeit, where lands be deuiſable by wil, (wher- 6 of we haue ſpoken before [n]) the † teſtator maie giue power and authoritie to his executor to ſell the ſame landes, either for the paiment of his debts, or for ſome other purpoſe [o], and the ſale made thereof by the ſaid executor is good and lawfull [p]: inſomuch that diuers perſons be- 7 ing named executors by the teſtator, though † part of the executors named in any ſuch teſtamēt of any ſuch perſon, making or declaring any ſuch will of any landes, tenemens, or other hereditaments, to be ſolde by his executors, after the death of any ſuch teſtator, doo refuſe to take vpon

g) L.fin.§.fin.de iure de lib.C.
h) Terms of Law.verb. executor.
i) Brook Abridg.tit. executor.n.112.
k) c.ſine culpa.de reg. iur.6.quod ſi per eum ſtetit, quo minus habeat, in eo caſu eſt, de iure ciuili et eam.ac ſi in manibus retineret. L. iure ciuili.ff.de cond. & demon. Peckius in c.cùm non ſtat.de reg. lib.3.c.6.& 7.
l) Doct.& Stud.lib. 1.c. 7.& c.24 Idem lib.2. c. 10.& c.12.termes of law.verb.executor.
m) Doct.& Stud.vbi ſupra. Tract.de rep ub. Angl.lib.3.c.6.7.
n) Supr.part.3.§.1. cum ſequentibus.
o) Perkins.tit.deuiſe. fol.104.105.
p) Perkins.eod.loco.

vpon him or them the adminiſtration & charge of the ſame teſtament and laſt wil, wherein they be ſo named to be executors, and the reſidue of the ſame executors doo accept and take vppon them the care and charge of the ſame teſtament and laſt will, it is enacted by the ſtatutes of this realme [q], that then all bargaines, and ſales of ſuch landes, tenements, and hereditaments ſo willed to bee ſolde by the executors of anie ſuch teſtator, as well before the making of that ſtatute, as after made, or to be made by him or them onely of the ſame executors that ſo doth accept, or hath accepted or take vpō him or thē, any ſuch cure or adminiſtration of any ſuch will and teſtament, ſhall be as good and effectuall in lawe, as if all the reſidue of the ſame executors, named in the ſaide teſtament, ſo refuſing the adminiſtration of the ſame teſtament, had ioined with him or them in making of the bargaine and ſale of ſuch landes, tenements, or other hereditaments, ſo willed to be ſolde by the executors of any ſuch teſtator, which beforethat time had made or declared, or that after ſhould make or declare any will of any ſuch landes, tenements, or other hereditaments after his deceaſe to be ſolde by his executors, as may appeare by the ſtatute in that behalfe made. Howbeit it is prouided, that the ſaid ſtatute ſhal not extend to giue power and auᵭhoritie to anie executor or executors at anie time after, to bargaine, or to put to ſale, anie landes, tenements, and hereditaments, by vertue and auᵭhoritie of anie will or teſtament, made before the ſaide ſtatute, otherwiſe

q) Stat. H. 8. an. 21. c. 4.

therwiſe then they might doo by the courſe of the common lawe, afore the making of the ſame.

Beſides that, ſuppoſing the caſe were ſuch, as the landes being deuiſable, the executors had power by teſtament to ſell the ſame lande, and to diſtribute the profits *in pios vſus*: yet after the death of the teſtator, the inheritaunce ſhall deſcende vnto the heire, and ſhall remaine in him, vntill the executor haue ſolde the ſame[r]. And if the executors themſelues doo enter into the landes, after which entrie ſome man offereth a ſumme of money or price of the ſame land, and the executors refuſe to take the money offered, becauſe the money offered, is vnder the value of the lande, and the executors intende to ſell the ſame dearer, and ſo keepe the lande in their owne handes, by the ſpace of one, two, or three yeares, conuerting in the meane time the profites ariſing forth of the ſame land, to their own proper vſe. In this caſe, the heire of the teſtator deceaſed, may enter to the landes, and put out the executor[s].

r) Perkins. tit. deuiſes. fol. 104. 105.

s) Perkins. vbi ſupra. Brook Abridg. tit. deuiſe. n. 19.

8 As † for rents due to the teſtator by the order of the common law of this realme[t], the executors or adminiſtrators of tenants in fee ſimple, tenantes in fee taile, and tenants for tearme of life, of rent ſeruices, rent charges, rent ſecks and fee fermes, haue no remedy to recouer ſuch arrerages of the ſaid rentes or fee fermes, as were due vnto thoſe teſtators in their liues, nor yet the heires of any ſuch teſtator, nor any perſon hauing the reuerſion of his eſtate after his deceaſe

t) Vide ſtat. H. 8. an. 32. c. 37.

„ deceaſe, may diſtraine or haue any lawfull ac-
„ tion to leaue any ſuch arrerages of rentes or fee
„ fermes,due vnto him in his life,by reaſon wher-
„ of the tenantes of the demaine of ſuch landes,
„ tenements,or hereditaments, out of the which
„ ſuch rents were due and paiable, who of right
„ ought to pay their rents & fermes,at ſuch daies
„ & terms as they were due, did many times keep
„ holde,and retaine ſuch arrerages in their owne
„ handes, ſo that the executors and adminiſtra-
„ tors of the perſons,to whom any ſuch rents or
„ fee ferms were due, could not haue or come by
„ the arrerages of the ſame, towards the paiment
„ of the debts,and performance of the will of the
„ ſaid teſtator.For remedie wherof, it is enacted
„ by the ſtatutes of this realme,as followeth, viz.
„ that the executors and adminiſtrators of euery
„ ſuch perſon or perſons, vnto whome anie ſuch
„ rents or fee fermes, is or ſhall be due, and not
„ paide at the time of his death, ſhall and maie
„ haue an action of debt for all ſuch arrerages a-
„ gainſt the tenant,or tenants,that ought to haue
„ paide the ſaide rent or fee ferme, ſo being be-
„ hind in the life time of their teſtator, or againſt
„ the executors and adminiſtrators of the ſaid te-
„ nants. And alſo furthermore, it ſhall be lawfull
„ to euerie ſuch executor or adminiſtrator of any
„ ſuch perſon or perſons, to whom ſuch rent or
„ fee ferme is or ſhall be due, and not paide at the
„ time of his death,as is aforeſaid,to diſtraine for
„ the arrerages of all ſuch rentes and fee fermes,
„ vpon the landes,tenements, or other hereditа-
„ ments, which were charged with the paiment

of

of ſuch rents or fee fermes, and chargeable to „
the diſtreſſe of the ſaide teſtator, ſo long as the „
ſaide landes,tenements,or hereditaments, con- „
tinue, remaine,and be in the ſeaſin or poſſeſſion „
of the ſaid tenant in demaine, who ought im- „
mediately to haue paide the ſaide rent or fee „
ferme ſo being behinde to the ſaide teſta- „
tor in his life time,or in the ſeaſin or poſſeſſion „
of any other perſon, or perſons, claiming the „
ſaid lands,tenements,and hereditaments onely „
by and from the ſaid tenant by purchaſe,gift,or „
diſcent,in ſuch like maner & forme,as their ſaid „
teſtator might,or ought to haue done in his life „
time: And the ſaide executors and adminiſtra- „
tors ſhall for the ſame diſtreſſe, lawfully make „
auowrie vpon their matter aforeſaid. Prouided „
alwaies, that this act nor any thing therein con- „
teined, ſhall not extend to any ſuch mannour, „
lordſhip,or dominion in Wales, or in the mar- „
ches of the ſame, whereof the inhabitants haue „
vſed time without minde of man, to pay vnto „
euerie Lord or owner of ſuch lordſhip,mannor „
or dominion, at his or their firſt entrie into the „
ſame,any ſumme or ſummes of money, for the „
redemption and diſcharge of all duties, forfai- „
tures,and penalties, wherewith the ſame inha- „
bitantes were chargeable vnto any of the ſaide „
lordes, aunceſtors, or predeceſſors before his „
ſaid entrie. „

And further,be it,&c. that if any man which „
now hath,or hereafter ſhall haue,in the right of „
his wife,any eſtate of fee ſimple, or fee taile, or „
fee ferme,and the ſame rents,or fee fermes now „

be

„ be,or hereafter ſhall be due, behinde and vn-
„ paide in the wiues life, then the ſaid husbande
„ after the death of his ſaide wife, his executors,
„ and adminiſtrators,ſhall haue an action of debt
„ for the ſaid arrerages, againſt the tenant of the
„ demaine,that ought to haue paid the ſame, his
„ executors or adminiſtrators; and alſo the ſaide
„ husbande, after the death of his ſaide wife,
„ may diſtraine for the ſaide arrerages in like
„ maner and forme, as he might haue done if his
„ ſaid wife had beene liuing, and make auowrie
„ vpon his matter,as is aforeſaid. And likewiſe it
„ is,&c. that if any perſon or perſons,which now
„ hath, or heereafter ſhall haue ,any rentes,or fee
„ fermes,for tearme of life, or liues, of any other
„ perſon or perſons , and the ſaide rent or fee
„ ferme,nowe or hereafter ſhall be due, behinde
„ and vnpaide in the life of ſuch perſon or per-
„ ſons,for whoſe life or liues the ſtate of the ſaide
„ rent or fee ferme did depende and continue:
„ And if the ſaide perſons doo die, then he vnto
„ whome the ſaide rent or fee ferme was due in
„ forme aforeſaide, his executors or adminiſtra-
„ tors ſhall, and may haue an action of debt a-
„ gainſt the tenant in demain, that ought to haue
„ paide the ſame when it was firſt due ,his execu-
„ tors and adminiſtrators,& alſo diſtraine for the
„ ſame arrerages vpon ſuch lands and tenements,
„ out of the which the ſaide rentes or fee fermes
„ were iſſuing and paiable,in ſuch like maner and
„ forme as he ought,or might haue done, if ſuch
„ perſon or perſons,by whoſe death the aforeſaid
„ eſtates in the ſaid rents and fee fermes was de-

termined

termined and expired, had been in full life and not deade; and the auowrie for the taking of the same distresse, to bee made in maner and forme aforesaid. „

Secondly †, concerning the testator, it shall be behouefull for thee that art desirous to bee resolued, whether it were better to accept or refuse the executorship, to inquire & learne whether the same testator were executor or administrator to anie other person.

If he were executor, then by the statutes of this realme [v], thou † being executor of an executor, shalt haue actions of debts, accountes, and of goodes caried away of the first testator, and execution of recognizances made in court of recorde, to the first testator, in the same maner as the first testator shoulde haue, if hee were in life, aswel of actions of the time past, as of the time to come, in all cases where iudgement is not as yet giuen betwixt such executors; but the iudgement giuen to the contrarie in times past, ought to stand in their force. And on the contrarie, the executor of the executor shal answere to others to whom the first testator was indebted, as much as he shall recouer of the goods of the first testator, euẽ as the first executor should doo, if he were in full life. But the goods which did belong to the first testator, shall not bee put in execution for the debt of the second testator, which goods the executor of the executor shall haue, by relation to the first testator, as immediately executor vnto him, and not by relation to the second testator, executor to the first testa-

v) Stat. 4. Ed. 3. an. 25. c. 5. Idem iure ciuili in hærede hæredis. L. 2. & 3. de petic. hæred. ff. Contrarium in hærede executoris, tàm iure ciuili, quàm canonico, Bar. & alij, in L. à filio. ff. de alimen. leg. gloss. in c. fin. de testa. 6. verb. mortuo.

tor[x], and so the propertie which the second testator had by the saide relation is taken away, and is in such case as if the second testator had neuer beene executor[y]. Howbeit this is to bee vnderstoode with this limitation, viz. if there bee no executor of the first testator suruiuing. For † if the testator did make diuerse executors, whereof some be yet liuing, that executor of the first testator suruiuing, and the executor of his coexecutor, cannot be ioined both together in one action[z]: but the executor of the first testator suruiuing, he alone shall haue action against the debtors of the first testator, and he alone shall be conuented by them, to whom the first testator was indebted, and not both iointly together[a]: for the executor of an executor hath not to deale with the goodes of the first testator in this case, that is to say, where there is an other executor of the first testator suruiuing: in so much that where there bee two executors, whereof one maketh an executor, and dieth, his coexecutor suruiuing, which coexecutor afterwardes dieth intestate: yet in this case the executor of the executor may not medle with the goodes of the first testator[b]: for so soone as the executor which made his testament died, (the other suruiuing) his power was determined or finished by his death, and all the power did remaine in the coexecutor suruiuing, who afterwardes dying intestate, it is in the power of the Ordinarie, to commit the administration of the goodes of the first testator not administred to the next of kinne to the first testator, and not to

11

the

x) Plowd. in casu inter Bransby & Grantham. Atque ita soluitur nodus de quo Bar. & alij in L. veluti. ff. de petic. hæred. vtrum videlicet hæres hæredis succedat priori testatori, ex testamẽto vel ab intestato? nobis enim intelligitur succedere ex testamento, vtcunq; non fuit in primo testamẽto nominatus, id quod disputandi rationem præbuit.

y) Plowd. vbi supr.

z) Brook Abridg. tit. execut. n. 99. Contrarium in hæredibus constituit ius ciuile, quo si aliquis ex hæredibus decesserit, pluribus relictis hæredibus, hi omnes accipere debent illampartem, quæ ad hæredem defunctum pertinuit, familiæ herciscundæ actione. L. si familiæ hercis. eod. tit.

a) Brook Abridg. tit. exec. n. 99.

b) Brook Abrid. tit. execut. n. 149.

the executor of that executor which died first[c]: Much leſſe may the executor of the executor meddle with the goods of the firſt teſtator, whē the coexecutor is yet liuing: And if he doo, the executor ſuruiuing maie haue action againſt him for ſuch goodes as he hath of the firſt teſtator[d]. And beſides that, the creditors of the firſt teſtator may haue action againſt the executor of the executor in this caſe, as executor of his owne wrong[e]. Moreouer, it is to be noted, that the executor of an executor cannot ſell the lande of the firſt teſtator, who by his teſtament gaue power to his executor to ſell the ſame[f]: for after the death of that executor the power ceaſeth; vnleſſe diuers being appointed executors, ſome of them die, or refuſe to prooue the will, for then the others ſuruiuing, or accepting, maie ſell thē ſame, as is aforeſaide.

c) Brook. d. n. 149. & in tit. admīſtr. n. 45.

d) Brook. tit. exec. n. 99.

e) Brook. eod. n. 99.

f) Brook. tit. exec. n. 3.

12 If† the partie deceaſed to whome thou art executor, were not executor to another, but adminiſtrator onely: thou art not to ſucceede in his place in the adminiſtration of the goodes[g], but a newe adminiſtration is to be graunted of the goodes not adminiſtred by the adminiſtrator to the next of kinne, not of the adminiſtrator, but of him that died firſt[h].

g) Fitzh. Abridg. tit. admīſtr. n 3.

h) Fitzh. vbi ſupr. principall grounds. fol. 61. pag. 2.

13 There is yet † a further conſideration to be had of ſome thinges, which ſeeme to concerne the teſtator, not to be neglected by the executor deſirous to bee reſolued, whether it were better to accept or refuſe the executorſhippe, namely the conſideration of the laſt wil and te-

ſtament of the deceaſed, & of the legacies and deuiſes therein giuen: Wherein the executor is not onely to conſider, whether the teſtator hath giuen more then the deathes part doth extend vnto, (in which caſe what courſe is to bee followed is alreadie elſewhere preſcribed[i]:) but alſo in caſe † any thing do remaine, the funeral, 14
debts & legacies diſcharged, the executor may not thinke to conuert the ſame to his owne proper vſe[k], nor any more of the teſtators goods then is giuen to him by the teſtator in his life time, or by his will, or which the ordinarie ſhall allowe him for his labour, or in lieu of ſome debts due vnto him by the teſtator, or due by the teſtator to ſome other perſon, and diſcharged by the executor[l]. And † if after due admo- 15
nition to him giuen, he refuſe the executorſhip, or to performe the will, he ſhall loſe his legacie bequeathed vnto him by the ſame teſtator, although hee were of kinne, or allied vnto the ſame teſtator[m]: the reaſon is, becauſe he is deemed vnworthie the benefite, that refuſeth the burthen[n]. Moreouer, lore the executor dooth what in him lieth, to make the partie deceaſed to die inteſtate[o]. But if the executor be not admoniſhed to vndertake the office, then being the teſtators kinſman, or ſuch a perſon to whom the teſtator woulde haue giuen the legacie, though he did not performe the will, he dooth not looſe that legacie in not vndertaking the executorſhip[p]; neither ſhall the wife looſe her thirds, nor the children their filiall portions in refuſing the executorſhippe[q]: much leſſe ſhall the

i) Supr. part. 3. §. 17.

k) Magna charta. c. 18. c. ſtatutum. §. ſtatuimus. de teſta. lib. 3. prouincial. conſtit. Cant. Dominic. à S. Gem. in c. religioſus de teſtam. 6. n. 9. Doct. & Stud. lib. 2. c. 10. circa medium.

l) Text. in d §. ſtatuim'. Dyer. fol. 2. & fol. 310.

m) Rom. conſ. 207 & 235. cuius opinio communis eſt, vt per eand. conſ. 235. & p Gribald. Theſaur. com. op. verb. tutor.

n) c. qui ſentit. de reg. iur. 6.

o) Gribald. Theſaur. com. op. verb. tutor.

p) Iaſ. Alex. & Sichard. in L. ſi legatarius. C. de leg.

q) Auth hoc amplius. C. de fideicommiſ. Nouel. de hæred. & falcid. §. ſi quis autem.

the creditour looſe his debt due by the teſtator.

After the conſideration of the eſtate of the
16 teſtator, he † that is named executor muſt alſo conſider his own perſon, in whom many things ought to concurre, but chiefly it is requiſite that he be *prudent, diligent and faithful* [r]: wherein if there bee anie defecte, I meane if either he be ignorant, negligent, or vnfaithful, he is verie like to finde the office verie troubleſome, peruaduenture alſo diſcommodious [s], vnleſſe there be certaine hope, that being ignorant hee will vſe the aduiſe of thoſe that be skilfull, and that of a negligent perſon he will become diligent, eaſinge himſelfe alſo of ſuch buſineſſe, as might hinder the expedition of this office, and that howſoeuer hee had behaued himſelfe in other affaires vnfaithfully: yet in this office hee will haue an honeſt care, well and truely to diſcharge that truſt committed vnto him, alwaies hauing before his eies, not onely the forfeiture of his bonde, by his vnfaithfull dealing, together with the ignominie by deceiuing the dead mans expectation, but alſo the daunger of his ſoule by the breach of his othe: for he muſt bee ſworne to execute the will, and to adminiſter
17 the goods well & faithfully [t]. If † a wife during the couerture be named executrix, there is this further to be cõſidered in her perſon, that ſhe alone cannot ſue for any debt due to the teſtator, nor be ſued for any debt due by the teſtator, without her husband [v]: but ſhe alone may doo any acte extraiudiciall, as the paying of debts or

r) Io. de Canib. Tract. de execut vlt. volunt. 3. particula. q. 1.

s) Io. de Cani. vbi ſupr.

t) Hoc viridi obſeruantia paſſim fit notorium, maxime infra prouinciam Ebor.

v) Brook Abridg. tit. execut. n. 178.

legacies, or the receiuing or releaſing of anie debtes due to the teſtator[x]: yea the husbande without the wife (though ſhe alone be executrix) may doo any extraiudiciall acte, aſwell as his wife executrix[y]: and therfore if the husband releaſe or remit any debt due to the teſtator, the ſame is good and auailable, not onely during the mariage, but alſo after the death of her husbend[z]. But if the wife die, the husband cannot conuert any of the goods and cattels belonging to the firſt teſtator to his owne proper vſe; for of ſuch goodes the wife her ſelfe may make a teſtament, appointing an executor without the licence of her husband, as is before more fully declared[a].

x) Brook. cod. n. 178.

y) Fitzh. Abridg. tit. exec. n. 23. 40. Brook. cod. tit. n. 147. 151. 152.

z) Fitzh. & Brook. vbi ſupra.

a) Supra. 2. part. §. 9.

Finally, concerning the perſons of other with whome thou that art named executor in the teſtament haſt to deale; it behoueth † thee to haue a ſpeciall conſideration of thy *coexecutor*[b], (if any be) leaſt he be an ouermatch for thee, that is to ſay, whether he be of more experience, and greater wealth then thou art, and namely whether he be a couetous and contentious perſon[c]. If he be, take thou good heed, for it is to be feared, that † he wil keepe all the goods from thee[d], that he alone will receiue the debts due to the teſtator, and make them a releaſe, for this alſo he may doo[e]: without doubt, if he be ſuch a perſon, he hath learned this leſſon, that *one † executor cannot ſue another*, for poſſeſſion of the teſtators goods[f], becauſe howe many executors ſoeuer they bee, they are all but as one perſon, and no man can ſue himſelfe[g]: and ſo the

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b) Io. de Canib. Tract. de exec. vlt. vol. particula. 2. q. 1. n. 17.

c) Io. de Cani. d. q. 1. n. 18

d) Brook Abridg. tit. exec. n. 98.

e) Brook. tit. exec. n. 37

f) Brook. cod. tit. n. 98.

g) Arg. c. debitum de bapti. extr. L. præter. ff de tut. & cur. dat. ab his Plowd. in caſu inter Panor. & Yardley. fol. 343.

the poſſeſſiō of one is as the poſſeſſion of another[h]; & herby thou ſhalt remain without remedie, vnleſſe it be for a legacy left vnto thee alōe[i], or vnleſſe thou maiſt haue ſome ſlender remedie before the Ordinarie[k]. It is alſo verie likelie, that
21 he alone † wil ſell the teſtators goods: In which caſe he alone will & may ſue for the money due for the ſame[l]: but if there be any debt due to be paied in the behalfe of the teſtator, then looke aſſuredly that thou ſhalt be ſued as well as he[m], howſoeuer execution may paſſe againſt him alone which hath the goods[n]. To conclude, if thy coexecutor be ſuch a perſon, as is aforeſaid, a hundred to one he will not ſuffer thee to partake of the commoditie, but of the trouble thou ſhalt not auoid but be partaker.

22 This alſo is not to be omitted, that † if thy coexecutor doo refuſe the executorſhip before the ordinarie, and thou alone doſt proue the teſtament, yet may he afterwards (ſo long as thou liueſt) adminiſter the goods, or remit the debts due to the teſtator[o], and thou canſt not hinder him; neither canſt thou recouer againſt the
23 perſons by him ſo releaſed[p]. After † conſideratiō of thy coexecutor, there is regard alſo to be had to the reſt of thoſe perſons with whome thou art to deale, viz. to the creditors and legataries, and to the paiment of debts; for debts are to be paide before legacies[q]: and of debtes ſome are to be preferred and ſatisfied before others, and likewiſe of legacies, as els where hath bene[r], and ſhal be[s] ſhewed: otherwiſe it may come to paſſe that the executor ſhalbe forced to pay out of his

h) Fitzh. tit. exec. n. 32.
i) Brook. tit. exe. n. 104.
k) Brook. eod. tit. n. 37
l) Brook. tit. exec. n. 66
m) Supra part. 4. §. 20
n) Brook. tit. exec. n. 26
o) Brook. tit. exec. n. 38 Dyer. fol. 160
p) Brook. eod. tit. n. 37 & n. 117
q) I. ſcimus. C. de iure delib.
r) Supr. part. 3. §. 17.
s) Infr. eod. part. §. 16.

owne purse, after he haue spent all the testators goodes and cattels [t].

t)d.L scimus.Doct.& Stud.lib.2.c.10.

By the due consideration of those things, viz. First, of the estate or condition of the testator: secondly, of his owne estate; and thirdly of the coexecutor or other person with whom he is to haue any dealing, it is not hard in my opinion for the executor to collect, whether it is likely to be beneficiall or hurtfull, to accept or refuse the executorship, and to resolue accordingly, at the least if hereunto hee also take a viewe of those things which doo appertaine to the office of an executor, accepting the executorship hereafter described [v].

v)Infr.ead.part.§.5. num §§.sequentibus.

Of the time vvhich the executor hath to consult, whether he will vndertake or refuse the executorship.

¶ *The time of deliberation arbitrarie.*

§.iiii.

THe time † wherein he that is named executor in the testament, is to deliberate and determin, whether he will accept or refuse the executorship is vncertaine, and *left to the discretion of the Ordinarie* [a], who vseth at his pleasure, and when he wil, not

† ¶

a)Legatin.libertatem de exec.testa.& ibi Io. de Athon.verb.approbatam consuetudinem.

not onely within the yeare[b], but within a moneth or two, to cite him that is named executor, to accept or refuse the executorship.

b) Quod verò annus deliberandi iure ciuili conceditur (L. cum in antiquioribus. C. de iure delib.) Illud ita intelligendũ, vbi hæres non confecto inuentario tenetur vltra vires hæreditatis. Siquidem non tenetur hæres inuentarium facere, si iuri tantùm ciuili attendamus (L. scimus. §. fin. de iure delib. C. & ibidem Sichard.) dummodo velit subire periculum soluendi vniuersa defuncti debita: Sed iure Legatin. quo nos cõmuniter vtimur, executor tenetur præcisè ad confectionem inuẽtarij, nec tenetur vltra vires bonorũ. Quare sublata causa, id est, periculo soluendi debita vltra vires bonorum defuncti, per confectionem inuentarij, quam non potest euitare (vt infra eadem parte §. 6.) sublatâ (inquam) causâ, tollitur effectus, id est, annuale tempus deliberandi: Num velit huic periculo seipsum subijcere? nam executores quoad confectionẽ inuentarij, tutorum potius quàm hæredum naturam sapiunt. Lind. in c. statutum. §. inhibemus. de testa. L. 3. prouincial. constit. Cant. verb. prius.

Of the office of an executor testamentarie, vndertaking the executorship.

1 *Wherein the office of an executor doth principallie consist.*

§. v.

1 IT † appertaineth to the office of an executor testamentarie heere in England, accepting the executorship (amõgst other things[a]) to cause an inuentarie to be made[b], to procure the will to be proued and approued[c], to pay the testators debts and legacies[d]: and finally to make an account[e].

a) De quibus consulas velim Io. de Canib. Tract. de executor. vlt. vol. part. 2. q. 1. n. 26. vbi decem enumerat executoris officio incumbentia.
b) Vt infr. eod. part. §§. 6. 7. 8. 9. 10.
c) Vt infr. eod. part. §§. 11. 12. 13. 14. & 15.
d) Infra §. 16.
e) De quo infr. eod. par. §§. 17. 18. 19. 20. 21.

Of diuers questions about the making of an inuentarie: and first, whether it be of necessitie that an Inuentarie be made.

1 *By the lawes ecclesiasticall of this realme, and statutes of the same, an inuentarie is necessarie.*
2 *The executor which presumeth to administer the goodes, and refuseth to make an inuentarie, may be punished.*
3 *The reason of this necessitie.*

§.vi.

COncerning the making of an inuentarie, it is expedient to vnderstand *whether it bee simplie necessarie* that an inuentarie be made, *what things* are to be put into the inuentarie; *within what time* the inuentarie is to bee made; in *what maner*; and what be the *effects* of an inuentarie.

That † an inuentarie is necessarie to be made by an executor testamentarie, is euident, as well by the lawes ecclesiasticall of this realme[a], cõfirmed by continual vse; as also by the statutes[b] of the same: neither † ought the executor to meddle with the goods of the deceased, before hee make an inuentarie[c]. And if any executor refuse to make an inuentarie, & neuertheless presume to administer the goodes of the deceased, he may be punished at the discretion of the Bishop or Ordinarie[d]. 1 2

The † reason is, least the executor being disposed to deale vnfaithfully, should defraude the creditors or legataries, by concealing the goods of the deceased[e]. 3

a) Legatin. libertatem. tit. de executor. testam. c. statutum. §. inhibemus. lib. 3. prouincial. constit. Cant.
b) Stat. H. 8. an. 21. c. 5.
c) d. §. inhibemus.
d) Legatin. libertatem. de executor. testa.
e) Francis. Porcellin. Tract. de inuentario. q. 1. per §. sancimus. de hæred. & fal. in Auth.

What

What things are to be put into the inuentarie.

1 *All goodes, cattels, wares, merchandizes, moueable and immoueable, are to be put into the inuentarie.*
2 *Leases are to be put into the inuentarie.*
3 *Corne on the grounde is to bee put into the inuentarie.*
4 *Grasse or trees growing, are not to bee put into the inuentarie.*
5 *Whether such things as are affixed to the freeholde, ought to be inuentaried.*
6 *Whether debts are to be put into the inuentarie.*
7 *Whether money due for land, is to bee put into the inuentarie.*

§. vij.

1 THe † things that are to be put into the inuentarie, are all the goods, & cattels, and rights which were the testators, or did belõg, or were due vnto him at the time of his death, whether they bee moueable or immoueable, corporal or vncorporall[a]: wherunto also agreeth the statutes of this realme, wherby it is enacted, that a true and perfect inuentarie be made of the goods, cattels, wares, merchandizes, as well moueable as not moueable, whatsoeuer that 2 were of the person deceased[b]: and therefore † leases ought not to be omitted foorth of the inuentarie[c], how many soeuer they be.

a) Francis. Porcellin. Tract de inuentar. q 3. Pract. Petr. de Ferrar. de forma libelli, quo agitur ad reddendam rationem Tutel. Sichard. in §. fin autem. L. fin. C. de iure delib. n. 9.

b) Stat. H. 8. an. 21. c. 5.

c) Cattalla etenim sunt realia. Termes of law. verb. chattels.

Like-

Likewise † emblemetes, or corne growing vpon the ground ought to be put into the inuentarie, seeing they belong to the executor[a]: but † not the grasse or trees so growing, which belōg to the heire[c], nor † things that are affixed to the tenement, and are made parcell of the free holde: such I meane as belong likewise to the heire, and not to the executor[f]. 3 4 5

The † debts due to the testator are to bee put into the inuentarie[g]. But the debts due by the testator, they need not to be put into the inuentarie[h]: and if any such debts be put into the inuentarie the Ordinarie shall do well to make diligent examination, whether the testator did owe any such: for many times debtes are thrust into the inuentarie which are not due by the testator, and so the legataries and children of the deceased, are often defrauded, at least of some part of their due, by the vnfaithfulnesse of the executor, and negligence of the Ordinarie, or his officer. 6

Landes †, tenements, and hereditamentes, with their appurtenances, such I meane as doe not belong to the executor, but descend to the heire, are not to be put into the inuentarie: Insomuch that if the testator will by his testament or last will, that the same lands be solde: In this case by the statutes of this realme, neither shall the money thereof comming, nor the profites of the saide landes for any time, be accounted as any of the goodes or cattelles of the person deceased[i]: and consequently are not to be put into the inuentarie. 7

Within

a) Perkins. tit. deuise. fol. 99. & hanc opinionem longeuus comprobauit vlus, quicquid dicat Sichard. post Angel. in d. §. sin autem.

e) Perkins. vbi supra.

f) L. accessorium. de reg. iur. 6. huc facit. L. cætera. de leg. 1. ff. in princ.

g) Gloss. in L. chirographus. ff. de admstr. tut. Quod verum quidem est, si existant instrumenta, aliàs non requiritur, vt inscribantur, donec recuperentur, & in manibus tractentur, vt quæ interim non rectè dicantur reperta. Lindw. in d. c. statutum. §. inhibemus, verb. bonis. Pract. Ferrar. forma libelli, ad reddendā rationem tut. §. in suo. n. 13. Æquum tamen est, vt aliqua fiat commemoratio huiusmodi creditorum, vtut incertorum, ne sublata penitus eorum memoria decepti maneant defuncti creditores, liberi, legatarij, vel alij interesse habentes in ea parte.

h) Lind. in d. c. statutū, & Ferrar. vbi supra.

i) Stat. H. 8. an. 21. c. 5.

Within vvhat time the inuentarie is to be made.

1 *The time for making and exhibiting the inuentarie, is left to the moderation of the ordinarie.*
2 *The inuentarie ought to bee made before the executor meddle with the teſtators goodes, except in ſome caſes.*

§.viij.

1 THe† time appointed for the making and exhibiting of the inuentarie, by the lawes eccleſiaſticall of this realm, is left to the diſcretion and moderation of the Ordinarie[a], who may appoint a ſhorter or longer time, as the diſtance of the place where the goodes remaine, being more or leſſe, together with other circumſtances, ſhall miniſter occaſion[b].

2 And† if the ordinarie doo not appoint a time, the executor had neede to beware, that he doo not adminiſter the goodes of the deceaſed, vntill he haue cauſed an inuentarie to be made: For how ſoeuer the acte of him that is named executor, is ſaide to holde in lawe before the prouing of the will[c], and the making of the inuentarie[d]: neuertheleſſe, hee that ſo preſumeth to meddle and adminiſter as executor before he make an inueniarie, is ſubiect to eccleſiaſticall puniſhment[e], vnleſſe it be for doing ſuch things, as cannot be deferred till the inuentarie be

a) Text. in c. ſtatutum. §. inuentarium. tit. de teſta. lib. 3. prouincial. conſtit. Cant. vnde palã eſt non obtinere ius ciuile, quo hæres ad perficiendum inuentariũ quandoque 66. dies, quandoq; annum habeat, maxime ſi incipiat intra menſem à morte defuncti. Sichard. in L. fin. §. ſin autem. C. de iure delib.

b) Lind. in c. ſtatutum, verb. arbitrio.

c) Plowd. in caſ. inter Greisb. & Fox.

d) Lindw. in d. c. ſtatutum. verb. prius. in fin. illius gloſſ.

e) Legatin. libertatem. de executor. teſtam.

be made; as for intermedling about the funerals, or disposing of such thinges as cannot bee preserued with keeping, and such like[f].

f) Io. de Athon. in d. legatin. libertatem. verb. inuentarium. d. c. statutum. §. inhibemus. in text. & in gloss.

Of the forme to be obserued in the making of an inuentarie.

1 *What persons ought to be present at the making of the inuentarie.*
2 *Whereof the inuentarie is to be made.*
3 *Inuentarie indented.*
4 *Of the othe of the executor about the inuentarie.*
5 *The goods and cattelles are to be valued.*
6 *Of the auncient forme of preising the goodes.*

§. ix.

a) Stat. H. 8. an. 21. c. 5.

BY the statutes of this realme[a], it is thus enacted concerning the forme to be obserued by the executor testamentarie in making of an inuentarie; viz. that the † executor or executors, named by 1
the person deceased, calling or taking vnto him or them of such persons two at the least, to whō the person dying was indebted, or made any legacie, & vpō their refusall or absence two other honest persons, in their presence & by their discretions shall make, or cause to be made, a true and perfect inuentarie † of all the goodes and 2
cattels, wares and merchandizes, as well moueable as not moueable, whatsoeuer that were of the said persons so deceased; and the † same shal 3
cause to be indented, whereof one part shall be

by

4 by the ſaide executor vpon † his othe to bee taken before the Biſhops ordinaries, their officials, & ordinaries, or other perſon hauing power to take probate of the teſtament, vpon the holy Euangeliſt to be good and true; and the ſame one part indented ſhall preſent and deliuer into the keeping of the ſaid biſhop, ordinarie, or ordinaries, or other perſõ hauing power to take probate of teſtaments; and the other part of the ſaide inuentarie indented, to remaine with the executor: and that no biſhop, ordinary, or other perſon whatſoeuer, hauing auᶜthoritie to take probate of teſtaments, vpon paine in the ſaide ſtatute conteined (viz. tenne pound) doo refuſe to take any ſuch inuentarie to him or them preſented or tendered, to be deliuered, as is aforeſaide.

5 Thus farre the ſtatute, whereunto it may be added, that † it is not ſufficient to make an inuentarie, conteining all and ſingular the goods of the deceaſed, vnleſſe the ſame be particularly valued and praiſed [b] by ſome honeſt and skilfull perſons, to be the iuſt value thereof in their iudgements and conſciences, that is to ſay, at ſuch price as the ſame may be ſolde for at that time [c].

6 In ancient † time amongſt many other ſolemnities of inuentaries [d], this order was obſerued: Firſt of all the moueable goodes were inuentaried and praiſed, as houſhold ſtuffe, corne, and cattell, &c. then the immoueable, as leaſes of groundes or tenements, after that the debts due to the teſtator were ſet downe [e], which order

b) Bar. in L. fin. C. de magiſt. conuen. Hoc addito, quòd quoad confectionem inuentarij executores magis aſſimulantur tutoribꝰ, quàm hæredibus, vt ſuperiùs adnotaui ex Lind. in c. ſtatutum. §. inhibemus. de teſta. lib. 3. prouincial. conſtituc. Cant. verb. prius.

c) De probatione rei mobilis vel immobilis, vide Maſcard. Tract. de probac. verb. valor.

d) De quibus DD. in L. fin. §. ſin autem. C. de iure delib.

e) Franc. Porcel. Tract. de inuentario.

der is for the most parte obserued at this time here in England: sauing that some doo omit leases, wherein they do amisse[f]: others praise them among the moueables: but it were better to praise them seuerally.

f) Supra eod. part. §. 7.

Of the effect and benefite of an inuentarie.

1 *The goodes conteined in the inuentarie are presumed to be in the hands of the executor.*
2 *The testator is presumed to haue no more goodes then are described in the inuentarie.*
3 *Whether sufficiencie of goodes bee presumed when there is no inuentarie.*

§. x.

Diuerse be the effects and benefites of an inuentarie[a], this one I thought good to note, namely, that † all such goodes and cattels as are conteined in the inuentarie, are presumed to haue belonged to the testator, and after his death to belong, and to be in the power of the executor[b]. And on the † contrarie, that no more goodes, and cattels, are presumed to haue belonged to the testator then are conteined in the inuentarie[c]. 1 2

a) Quorum Castrensis quinque, Minsingerus septem ostendit: ille in d. L. scimus, iste in §. sed nostra. Instit. de hæred. qual. & differentia. Sed horum maxima pars nostratibus parũ prodest.
b) L. scimus. §. legitima. C. de iure delib. & ibi Sichard.
c) Bald. & Sichard. in d. §. legitima.

And therefore if any creditor or legatarie doo affirme, that the testator had any more goodes then be compriſed in the inuentarie, he must proue the same; otherwise the Iudge is to giue

giue credite to the inuentarie, being made in maner and forme aforesaide[d]. Although indeed
3 when † the executor entereth to the goodes of the deceased, and maketh no inuentarie thereof, nor wil not suffer the quantitie thereof to be knowen: In that case our lawe presumeth, that the testator had sufficient to discharge, not onely all his debts, but all his legacies also[e].

d) Alciat. Tract. de præsump. reg. 3. præs. 20. Mascard. de probac. concl. 939.

e) Bald. in L. filium. C. famil. herciscund. n. 37 Sichard. in L. fin. §. & si præfatam. C. de iure delib. n. 1.

Of the probation and approbation of testaments, and namely before whom they are to be proued.

1 *Diuers questions about the probation of testaments.*
2 *Testaments are to be prooued before the Bishop or Ordinarie.*
3 *Certaine cases wherein testaments are to be proued before others, then before the Bishop.*
4 *Of the prerogatiue of either Archbishop.*
5 *What is ment by* Notable goods.

§. xi.

1 CONcerning † the probation and approbation of testaments, these things are chiefly to bee enquired, *before whome* the testament is prooued, *by whom, when, howe,* and *what fees bee due* in that behalfe.

a) Legatin. libertatem. de execut. testam. c. item quia. c. statutum. de testa. lib. 3. prouincial. const. Cant. c. statutum. lib. prouincial. constit. Ebor. & Lindw. in d. c. statutum. Doct. & Stu. lib. 2. c. 28. Perkins. tit. testament. fol. 94. Trac. de repub. Angl. lib. 3. c. 7. stat. H. 8. an. 21. c. 5.

b) Perkins. vbi supra. Fitzh. Abridg. tit. testament. n. 3. Brook. eod. tit. n. 12. c. fin. de fide instr. extr. Sichard. in L. 2. n. 3. C. de testa.

2 The person † before whom the testament is to be proued, is the *Bishop of the Dioces*, where the testator dwelled[a], or his officer[b], to whom

by auncient custome obserued this many hundred yeares, together with the roiall consent of the kings and princes of this land, the probation and approbation of testaments haue appertained [c] : Sauinge † in certaine Signories or 3
Lordships, where the probation and approbation of testamentes of the tenaunts there dwelling, dooth by prescription appertaine to the principall Lord [d] : and sauing in certaine peculiar iurisdictions, where by prescription or composition, or other speciall title, the probation and approbation of the testaments of such as dwell and die within those places, dooth appertaine to the iudge of the peculiar [e] : And sauing where no goodes are bequeathed in the testament, but onely landes, tenements, and hereditaments, or other lay fee are deuised; and that in such places where neither insinuatiō, nor inrotulation is necessarie [f] : And sauing † where 4
the partie deceased at the time of his death had *notable goods* extant in diuerse dioceses or iurisdictions, for the probation, approbation, and insinuation or publication of the last willes and testaments of such persons, doth appertaine to the Archbishop or metropolitan, within whose prouince such notable goods be dispersed in diuerse dioceses or other inferior iurisdictions [g], whether it be within the prouince of Canterburie [h], or within the prouince of Yorke [i].

c) Lindw. in d.c. statutū. verb. ecclesiasticarum libertatum. Qui in d.c. Item quia verb. insinuationem, vbi existimat testamentorum insinuationem, seu publicationem, iure ciuili non pertinere ad episcopos, sed iure tantùm authenticorum, (quo ius codicis corrigitur, & quod ius authēticum sancitum fuit ab Imperatore Iustiniano vltra mille annos retro numerandos,) non solùm executio, sed etiam ipsa insinuatio & publicatio, coram episcopis ordinariam iurisdictionem exercētibus fieri potest, vt firmat Sichard. in L. 2. C. de testa. n. 3.

d) Fitzh. tit. testament. n. 2. Doct. & Stud. lib. 2. c. 28.

e) Io. de Athon. in legatin. libertatem. de exec. testa verb. Ordinario.

f) Supr. part. 3. §. 3.

g) Lind. in d.c. statutū. verb. ad quos pertinet. Perkins. tit. testament. fol. 94. Fitzh. Abridg. tit. admīstr. n. 7. Brook. eod. tit. n. 48. (h) Lindw. in d.c. statutum. verb. laicalis feodi. stat. H. 8. an. 23. c. 9. & pleniùs per Instrum. & Actorum libros. Curiæ prærogatiuæ Archiepisc. Cant. (i) Perkins. tit. testament. fo. 94. pag. 2. stat. H. 8. an. 23. c. 9. & euidētius per Instrum. & Actorum libros in archiuis Archiepiscopi Ebor. fideliter per plurimorum seculorum curricula conseruata.

What

5 What † is ment by *Notable goods*, in this place, or when they are so to be tearmed, diuers authors haue bene of diuers opinions. Some haue bene of this opinion, that if the testator died possessed of goods, or cattels, to the value of fortie shillings, in two seueral dioceſſes; then he ought to be deemed to haue *notable goodes*[k]. Others haue beene of this minde, that the testator is to be deemed to haue *notable goodes*, though at the time of his death he had but one penie in another Dioceſſe[l]. Others do not only varie from the former opinions, but are also at variance with them selues, accounting those for *notable goodes*, sometimes when they extend cleerely to a hundred shillinges sterling: some times when they extend to ten pounde eleuen shillings, vj. pence: sometimes when they extend to xxiij. pound three shillings, farthing, & not vnder[m]. Finally, others are of this iudgement, that he is said to haue *notable goods*, which hath goods to the value of ten pounde of currant money of England, dispersed in diuers dioceſſes or iurisdictions: and this opinion seemeth to me to be most commonly receiued[n].

k) Perkins. tit. testament. fol. 94.

l) Fitzh. tit. admñstr. n. 7.

m) Lindw. in d. c. statutum. verb. laicis.

n) Plowd. in casu inter Greisb. & Fox. fol. 281.

By vvhome the testament is to be proued.

1 *The testament is to be proued by the executor.*

2 *Any person hauing the testament may be compelled to exhibite the same.*

§.xij.

THe † person by whome the testament is to be prooued, is the executor named in the testament[a], whom the Ordinarie or other person hauing authoritie for the probate of the testaments, may conuent, to the intent to proue the testament, and to take vpon him the execution thereof, or else to refuse the same[b]. This may the Ordinarie or other competent iudge doo †, not onely *ex officio*[c], but at the instãce of any partie hauing interest[d], which interest is proued by the othe of the partie[e]. 1 2

If the executor haue not the testament in his custodie, but some other person, then may such person be compelled to exhibit the same[f]. And it is sufficient to proue that once he had it, for he is presumed still to haue the same, vnlesse he affirme vpon his othe, that the same is not in his possession[g].

a) Perkins. tit. testament. fol. 93.

b) Stat. H. 8. an. 21. c. 5.

c) L. 1. ff. quemadmodũ testa. app. & ibi Bar. n. 1.

d) Bald. & Angel. in d. L. 1. Opinor etiam quòd ad eius instantiam, cui nihil est relictũ exhibendum testm. scilicet, vt inde certior fiat, Nunquid legatum aliquod sibi relictum sit a defuncto. gloss. & Bald. in L. 2. ff. quemadmodum. testa. app. in princ.

e) Bar. & Bald. in d. L. 1.

f) L. 1. in prin. & §. hoc interdict. ff. de Tab. exhibend.

g) Alex. in L. 2. C. de testa. n. 3. verb. tamen.

When the testament is to be exhibited and prooued.

1 *The testament is not to bee proued whiles the testator liueth, but after his death.*

2 *If it be vnknowen whether the testator be dead or aliue, whether may his testament be proued.*

§.xiii.

§.xiii.

1 IF † the teſtator bee yet liuing, the Iudge may not proceede to the prouing and publiſhing of his teſtamẽt[a], at the petition either of the executor, or any other, ſauing at the requeſt of the teſtator himſelfe[b].

If the teſtator bee dead, the Iudge maie proceede to the prouing of the will[c]: and the time of exhibiting and prooouing the ſame, is left to his diſcretion, and he may appoint a longer or a ſhorter time, according as the place is further diſtant, or nearer, or as other due circumſtances ſhall induce him[d].

2 If † it be vnknowen whether the teſtator be liuing or dead: For as much as ſome are of opinion, that euery man is preſumed to liue till he be an hundred yeares olde[e]: it ſeemeth by this opinion, that the Iudge may not in the meane time proceede to the publication of the teſtament, vnleſſe there be lawfull proofe, or ſufficient preſcription for the teſtators death. On the contrarie, others are of opinion, that a man is not preſumed to liue ſo long, that is to ſay, vntil he attaine to an hũdred yeares[f], for that men commonlie die betwixt lx, and lxx. yeares of their age[g]: and ſo by their opinion, it ſeemeth that the will may be prooued after the age of ſeuentie yeares, of him that is abſent, for that hee is not then preſumed to be liuing.

I ſuppoſe if a man be abſent, and no certaine

a) L.2.§.ſi dubitetur. in fin. ff. quemadmodum teſta.app.

b) Bar.in d.§. ſi dubitetur. Sichard.in L.2.C. de teſta.

c) L.2.C.de teſtam.& DD.ibidem.

d) L.2.§.vtrum.ff.quẽ admodum teſta.app.

e) Quam opinionem (tanquam communẽ) acriter defendit Viurus.Theſaur.com.op. verb.viuere.Molinæum hæreticum appellans qui contrariam crebriorem dixit.

f) Quorum opinionẽ magis communem refert Molinæus in Apoſtil.ad Alex.conſil.18. vol.5.n.24.

g) Franc. Herculan. de probac.negatiuæ.n. 290.pro quo facit. Pſalmus 89.

proofe of his death, or life, that the will maie be prooued, and that the testament it selfe is a presumption of his death in this case[h].

h) Ias. & Sichard. in d. L. 2. C. de testa. alter. n. 7. alter. n. 8.

Of the maner of prooving Testaments.

1 *The forme of prooving testaments, is twofold.*
2 *Of the vulgar forme.*
3 *Of the forme of lawe.*
4 *Of the difference betwixt the vulgar and the legall forme.*
5 *Of a thirde forme of probation of testaments.*
6 *Of the othe and bond of the executor.*

§. xiiij.

THat it is necessarie for the proofe of testaments, that there be either witnesse or writing, is alreadie declared[a]: Also what number of witnesses, and what maner of writing is sufficient, is likewise declared[b]: wherfore in this place, I shall not neede to speake, saiuing onely of the manner of proceeding in the probation and approbation of testaments.

a) Supra part. 4. §. 1.

b) Supra d. part. 4. §. 25. 26.

This † maner and forme therefore heere in England, is of two sortes, the one is called the *vulgar or common forme*, the other is tearmed, the *solemne forme, or forme of law*[c]. 1

c) Ad imitationem cõfirmationis, quæ nunc fit in forma communi, nunc in forma solenni, & specifica. Molin. in consuet. Paris. §. 5. Alex. consil. 123. vol. 4. n. 18. & c. Dec in Rub. de consir. vtili vel inutili.

The † *vulgar or common forme*, is more compendious or briefe then the other: For after the death of the testator, the executor presenteth 2

teth the teſtament to the Iudge, and in the abſence, and without citing or calling of ſuch as haue intereſt, produceth witneſſes to prooue the ſame, who teſtifiyng vpon their othes (*viua voce*) that the teſtament exhibited, is the true, whole, and laſt teſtament of the partie deceaſed[a]: The iudge doth therupon, and ſometimes vpon leſſer proofe, annex his probate and ſcale to the teſtament, whereby the ſame is confirmed[c].

3 When † the teſtament is to be prooued *in forme of lawe*, it is requiſite that ſuch perſons as haue intereſt[f] (that is to ſay) the widow and next of kinne to the deceaſed, to whom the adminiſtration of his goods ought to be committed, if he had died inteſtate[g], are to be cited to be preſent at the probation and approbation of the teſtament[h], in whoſe preſence the will is to bee exhibited to the iudge, and petition to bee made[i] by the partie which preferreth the will[k], and enacted[l] for the receiuing, ſwearing and examining of the witneſſes vpon the ſame, and for the publiſhing or cõfirming thereof[m]: wherupon witneſſes are receiued, and ſworne accordingly, and are examined euerie one of them ſecretly, and ſeuerally, not onely vpon the allegatiõ or articles made by the partie producing them: but alſo vpon interrogations miniſtred by the aduerſe partie[n], and their depoſitions committed to writing[o]: afterwards the ſame be publiſhed, and in caſe the proofe be ſufficient,

d) Stat. H. 8. an. 21. c. 5.
e) Quæ omnia frequẽtiſſimâ paſſim obſeruatione fieri eſt manifeſtum.
f) Bald. in L. 2. C. de teſta. n. 2. Sichard. in eand. L.
g) Stat. H. 8. an. 21. c. 5. Et hi quidem, vt videtur, citandi ſunt nominatim, licet ſi incertum ſit quis ſuccedere debeat ab inteſtato ſufficit citatio generalis omnium, ſcilicet quorum intereſt. Sichard. poſt Bald. in d. L. 2. Kling de teſta. ordin. Inſtit. n. 10. & n. 14.
h) Aliàs quoad non citatos, nullum facit prę-iudicium. Paul. de Caſtro. conſil. 96. vol. 1. Sichard. in d. L. 2. n. 4. Graſſ. Theſaur. com. op. §. teſtm. q. 61. Kling. vbi ſupra.
i) Non tum requiritur libellus, vel litis conteſtatio. Sichard. in d. L. 2 n. 7. in fin. Simo de Prętis de interp. vlt. vol. lib. 2. dub. 2. fol. 3. n. 4.
k) Nec refert an ſit executor, vel fideicommiſſarius, vel legatarius; vel an futurus ſit reus, an actor, quamuis contrarium quoad legatarium reſpondeat Pariſ. conſ. 24. vol. 3. ſed male, vt per Simo. de Prætis. vbi ſupra.
l) Bald. in d. L. 2 C. de teſta. n. 3. vbi aſſignat rationem. (m) Formam petic. vide apud Sichard. in d. L. 2. n. 2.
n) Bald. & Sichard. in d. L. 2. (o) Bald. Alex. & Sichar. in d. L.

the Iudge doth by his sentence or decree, pronounce for the validitie of the testament[p].

Which † two formes being compared together, we may easily perceiue the differences betwixt the one and the other: of which differences, I suppose this to be of the greatest moment, that in the vulgar forme, such as haue interest are not cited to be present at the probation of the will, whereas obseruing the forme of lawe, they are to be cited to that ende: which difference of forme woorketh this diuersitie of effect, namely that the executor of the will proued in the absence of them which haue interest, may be compelled to proue the same againe in due forme of lawe[q]. And if the witnesses be dead in the meane time, it may indaunger the whole testament[r], especially if ten yeares be not past since the probation, whereby necessarie solemnities are presumed to haue bene obserued[s]: whereas the testament being prooued in forme of lawe, the executor is not to be compelled to proue the same any more: and although all the witnesses afterwardes bee dead, the testament doth still retaine his full force[t]. 4

Besides † these formes of prouing testaments aboue recited, which are referred to that kinde of probation which is called *publicatio testamenti*[u]; there is yet another forme, which is called *apertura testamenti*[x], which forme doth onely respect written or closed testaments[y]: in the making wherof, amongst many other solemnities, the ciuill lawe did require that the witnesses should put to their seales, and after the death of the 5

p) Non tamen opus est sententia definitiua in scriptis, sed interlocutoria. Bald. Alex. Castrens. & alij in d. L. 2.

q) Paul. de Castr. consil. 96. vol. 1. Simo de Prætis. de interp. vlt. vol. lib. 2. dub. 2. soluc. 3. fol. 207. n. 4 & 5.

r) Paul. de Castr. d. cō. sil. 96. DD. in L. 2. C. de testa.

s) L. filiusfamil. C. de petic. hæred. nisi forte contrarium probetur ex inspectione actorū.

t) L. 2. C. de testam. Socin. Iun. consil. 89. vol. 1. Kling. in tit. de testa. ordin. lib. 2. Instit. n. 10.

u) De qua in d. L. 2. C. de testa.

x) De qua in L. 1. ff. quemadmodum. testa. app.

y) L. 1. & 2. quemadmodum testa. app. ff. & DD. in L. 2. de testa. C.

the teſtator, at the opening of this written or cloſed teſtament; the ſame lawe did alſo require that the ſame witneſſes ſhould be called by the magiſtrate to acknowledge their ſeales [z], or to denie the ſealing [a]. But as we doo not obſerue that ſolemnitie of the ciuill lawe in the ſealing of the teſtaments by the witneſſes; no more doo we obſerue that ſolemnitie which the ciuill lawe requireth in opening of teſtamentes ſealed, vnleſſe this may ſeeme to haue ſome reſemblance with this third forme, *de apertura teſtamenti*, which is enacted in the ſtatutes of this realme, viz. that the Biſhop or Ordinarie, or other perſon hauing auᵭhoritie to take probate of teſtaments, vppon the deliuerie of the ſeale and ſigne of the teſtator, do cauſe the ſame ſeale to be defaced, and thereupon incontinent redeliuer the ſame ſealed vnto the executoror executors, without claime or chalenge thereunto, to be made [b], &c.

z) L. 4. ff. quemadmodum teſta. app.

a) L. 5. cod. tit. quemad.

b) Stat. H. 8. an. 21. c. 5. Crederem tamen huiuſmodi verba ſtatuti non referre veterem illam formam de apertura teſtamenti: ſed potius, quoniam multa ſolent aſtutè fieri, quãdo ſigillum mortui interceptum eſt, eà propter ſtatuto caueri, vt ſigillum ad Iudicem deducatur, vt ipſius forma ab eodem peruertatur. Materia autem executori ſtatim reſtituatur. Haddon. de reformac. legum eccleſiaſtic. tit. de teſta. c. 19.

6 Furthermore †, it is to bee noted that in what manner ſoeuer the teſtament be prooued, the executor before he be admitted by the Ordinarie to execute, and before hee haue the will vnder the ſeale of the Ordinarie, is to promiſe by vertue of his othe, and if it be behooful alſo to enter into bond, to make a true account when he ſhall be thereunto lawfully called by the Ordinarie [c].

c) c Statutum. §. & poſtquam. de teſta. lib. 3. prouincial. conſtituc. Cant.

What fees are due for and about the probation and approbation of testaments.

1 *Where the cleere goodes doo not exceede the value of fiue pounde, onely sixe pence is due to the Register.*

2 *Where the cleere goodes being aboue fiue pound, doo not amount to fortie pound, onely three shillinges sixe pence is due, viz. two shillings six pence to the Ordinarie, aud twelue pence to the register.*

3 *Where the cleere goods exceede fortie pounde, there fiue shillings is due, viz. two shillings sixe pence to the Ordinarie, and two shillings sixe pence to the Register.*

4 *What fees are due for the copies of testaments or inuentaries.*

5 *The penaltie whereinto they fal which offend by extorting greater fees then are here limited.*

§. xv.

a) Stat. H. 8. an. 21. c. 5.

IT is enacted and established by the statutes of this realme[a], that from the first day of Aprill, anno domini 1530, that † nothing shall be demaunded, receiued, or taken by any Bishop, Ordinarie, Archdeacon, Chancellour, Commissarie, Officiall, nor any other maner of persō or persons, whatsoeuer they be, which now haue, or at any time hereafter shall haue authoritie or power to take or retaine probation,

bation, insinuatiō, or approbation of testamēts, „
or testaments by himself, or themselues, nor by „
his or their registers, scribes, praisers, sūmoners, „
apparators, or by any other of their ministers for „
the probation, insinuation, and approbation of „
any testament, or testaments, or for what wri- „
ting, sealing, praising, regestring, fines making „
of Inuentaries, and giuing in of acquittances, or „
for any other maner of cause concerning the „
same, where the goods of the testator of the said „
testament, or person so dying, doo not amount „
cleerly ouer and aboue the value of an hundred „
shillings sterling, except onely to the scribe, to „
haue for writing the probate of the testament „
of him deceased, whose goodes shall not be a- „
boue the same cleere value of an hnndred shil- „
lings, sixe pence; and for the commission for the „
ministration of the goodes of any man decea- „
sing intestate, not being aboue like value of an „
C. shillings cleare, sixe pence. And that neuer- „
theless, the Bishop, Ordinarie, or other person „
or persons, hauing power or aucthoritie to take „
or receiue the probatiō or approbation of testa- „
ments, refuse not to approue any such testamēt, „
being lawfully tendered or offered to them, to „
be proued or approued, whereof the goodes of „
the person so dying, amount not aboue the va- „
lue of an hundred shillings sterling: so that the „
same testament be exhibited by him or them in „
writing, which was thereunto affixed readie to „
be sealed, and that the same testament be law- „
fully proued before the same Ordinarie (before „
the sealing) to be the true, whole, and last testa- „

ment

„ ment of the same testator, in such forme as
„ hath beene commonlie accustomed in that be-
„ halfe.

„ And when † the goodes of the testator doo 2
„ amount ouer and aboue the cleare value of an
„ hundred shillinges, and doo not exceede the
„ summe of fortie pounde sterling, that then no
„ Bishop, Ordinarie, or other kinde of person or
„ persons, whatsoeuer he or they be, now hauing,
„ or hereafter shall haue auᶜthoritie to take pro-
„ batiō or approbation of any testament or testa-
„ ments, as is aforesaid, by them selues, or any of
„ their said Regists, scribes, praisers, sūmoners,
„ apparators, nor to any other their ministers, for
„ the probation, insinuation, or approbation of a-
„ ny testamēt, or testaments, or for the regist ring,
„ sealing, writing, praising, making of inuentaries,
„ giuing of acquittances, fines, or any other thing
„ concerning the same, shall take, or cause to bee
„ taken of any person or persons, but onely three
„ shillings sixe pence, and not aboue; whereof to
„ be to the Bishop, Ordinarie, or to any other per-
„ son or persons, hauing power and auᶜthoritie
„ to take probation and approbation of any testa-
„ ment or testamentes, for him or his ministers,
„ two shillings sixe pence, and not aboue, and
„ twelue pence residue of the same three shil-
„ lings sixe pence, to the scribe, for the regist ring
„ of the same.

„ And where † the goods of the testator, or 3
„ person or persons so dying, doo amount ouer
„ and aboue the cleare value of fortie pound ster-
„ ling, that then the Bishop nor Ordinarie, nor o-

ther

ther perſon or perſons, nowe hauing, or which „
hereafter ſhal haue power or auᶜthoritie to take „
probate of teſtaments,as is aforeſaid, by him or „
themſelues , or any of his or their regiſters, „
ſcribes,praiſers,ſũmoners,apparators,or anie o- „
ther their miniſters, for the probation, inſinua- „
tion and approbation of any teſtament or teſta- „
ments,or for the regiſtring,ſealing,writing,prai- „
ſing,making of inuentaries, fines,giuing of ac- „
quittances , or any thing concerning the ſame „
probate of teſtaments , ſhall from the ſaide firſt „
day of Aprill,take or cauſe to be taken , of anie „
perſon or perſons,but onely fiue ſhillings , and „
not aboue , whereof to be to the ſaide Biſhop, „
Ordinarie, or other perſon, hauing power to „
take the probation of ſuch teſtament or teſta- „
ments, for him and his miniſters , two ſhillings „
ſixe pence,and not aboue,and two ſhillings, ſix „
pence reſidue of the ſame fiue ſhillings, to be to „
the ſcribe for regiſtring of the ſame , or elſe the „
ſame ſcribe to bee at his libertie to refuſe two „
ſhillings ſixe pence , and to demaund and haue „
for writing of euerie ten lines of the ſame teſta- „
ment,wherof euery line to containe ten inches „
in length,one penie. „

4 And in † caſe any perſon or perſons, „
at any time hereafter require a copie or co- „
pies of the ſaid teſtamentes ſo proued, or of the „
ſaid inuentarie ſo made, that then the ſaide Or- „
dinarie or Ordinaries,and the other perſons ha- „
uing auᶜthoritie to take probate of teſtaments, „
or their miniſters,ſhall from time to time , with „
conuenient ſpeede, without any fruſtratarie de- „

lay

„ lay deliuer,or cause to be deliuered,a true copie
„ or copies of the same, to the saide person so de-
„ maunding them,or any of them, taking for the
„ serch,& for the making of the copy,either of the
„ said testament or inuentarie,but only such fee as
„ is before rehearsed, for the registring of the said
„ testament;or else the said scribe or register to be
„ at his election, to demaund, haue, and take for
„ euery ten lines thereof, being full proportion
„ before rehearsed,one penie.

„ Prouided alwayes, that where any person
„ or persons,hauing power or authoritie,haue v-
„ sed to take lesse summes of mony then is aboue-
„ said for the probate of testaments commissions,
„ or administrations, or other cause concerning
„ the same, shall take or receiue such summe or
„ summes of mony for the probate of testaments
„ and commissions of the administrators, and o-
„ ther causes concerning the same, as they before
„ the making of this acte haue vsed to take, and
„ aboue.

„ And it is enacted†, that euerie Bishop,Ordi- 5
„ narie,Archdeacon, Chancellor, Commissarie,
„ Officiall,& other person and persons,hauing,or
„ they which hereafter shall haue authoritie to
„ take probate of testamẽts,their registers,scribes,
„ praisers,apparators and all other ministers what
„ soeuer they be, that shall do,or attempt to bee
„ done, and attempted against this acte or ordi-
„ nance in any thing shall forfaite for euery time
„ so offending to the partie grieued in that be-
„ halfe,so much mony as any such person aboue-
„ saide shall take contrarie to this present acte,and

ouer

ouer that ſhall looſe and forfaite tenne pounde ,,
ſterling, whereof the one moitie ſhall bee ,,
to the king, and the other moitie to the partie ,,
grieued in that behalfe, that will ſue in anie of ,,
the kings Courts for the recouerie of the ſame, ,,
in which action, no aſſoine ſhall be admitted or ,,
allowed.

Of the paiment of debts, legacies, and mortuaries.

1 *Many queſtions about the paiment of debts and legacies.*
2 *What debts are firſt to be diſcharged.*
3 *Of the debt due to the prince.*
4 *Of debts due by recognizance and ſtatute merchant.*
5 *Of iudgements and condemnations.*
6 *Of obligations.*
7 *Of billes and bookes.*
8 *Of debts without ſpecialtie.*
9 *Whether the executor may allow his owne debt.*
10 *Of paying part, and receiuing an acquittance for the whole debt.*
11 *Of paying the teſtators debts with the executors owne money.*
12 *Of Mortuaries.*
13 *No Mortuarie to be taken but in certaine caſes, and that vnder a certaine paine.*
14 *No Mortuarie due where the moueable goodes doo not extend to ten markes.*
15 *No Mortuarie due, but in thoſe places where they haue bene vſed to be paied.*
16 *One onely Mortuarie due, and that in the place of the*

the most abiding of the deceased.
17 Three shillings foure pence due for a Mortuarie, where the moueable cleare goodes doo exceede ten markes, but doo not amount to thirtie pound.
18 Sixe shillings viii. pence due for a mortuarie, where the cleare moueable goods extend to thirtie pounde or aboue, and be vnder fortie pound.
19 Ten shillings due for a Mortuarie, the cleare moueable goods extending to fortie pound or aboue.
20 Diuerse persons discharged of Mortuaries.
21 Other interpretations extending and limiting this statute concerning Mortuaries.

§. xvi.

a) Supr. ead. part. §. 3.

b) Supr. part. 3. §. 16.

c) Eod. §. 16.

d) Eod. §. 16.

e) Supr. part. 3. §. 17.

HOw † far the executor is bounde to pay debts and legacies[a], how the paiment of debts is to be preferred before legacies[b], how legacies are to be paid out of the deathes part[c], howe the deathes part is sometimes the whole cleere goods, some times halfe, and some times but a thirde part[d]: Also whether in case the legacies do exceed the deathes part, it be in the election of the executor to preferre one legacie before another; or what other order is to be taken[e]: Al these things are more fully heretofore declared[f], and neede not here to be iterated. It remaineth † therefore that in this place bee shewed, which debts are first to be discharged, in case there be not sufficient goods and cattels to pay all the testators debts, or whether it be in the power of the executor to pay which debts he will: and if any remaine

1

2

maine cleere, then whether Mortuaries are to be paied, and how much is to be paid for Mortuaries.

3 Firſt † of all therefore, I ſuppoſe that the debt due by the teſtator *to the Prince* is to be diſcharged, and that it is not in the choiſe of the executor, to preferre any other debt due to anie ſubiect [f].

4 Secondly †, the debt due vpõ *ſtatute merchãt & recognizance* is to be diſcharged (if there be aſſets) before any perſonal debt [g]: for that by force of the recognizance, not only the perſon of the debtor is bounde, but alſo after the day of payment be expired, the moueables of the debtor may be apprehended and ſolde for the paiment of the debt [h].

5 Thirdly † (if yet there remaine ſufficient goods and cattels) before other perſonal debts, whether they be due by obligation, bill, or otherwiſe, *iudgements and condemnations* are to bee diſcharged [i].

6 Fourthly †, (if the goods and cattels will ſuffice) *obligations* are to be diſcharged [k]. And if there be diuerſe obligations, then it ſeemeth to be in the power of the executor, to diſcharge which obligatiõ, & to gratifie which of the creditors he will [l]; which being done, the other creditors be without remedie, if there be no aſſets, vnleſſe the day of paiment in the one obligatiõ be expired, and the day of paiment of the other obligatiõ is not yet come; in which caſe the former obligation is to be firſt ſatisfied [m]; or vnleſſe there be ſuite commenced for ſome obligation,

f) Magna charta. c. 18. quod verum eſt non ſolùm in actionibus perſonalibus, ſed etiam in hypothecarijs, ſaltem iure quo nos vtimur, vtcunque iure ciuili ex hypothecarijs creditoribus prior tempore, potiór iure.

g) Quib⁹ enim res obligatę ſunt, ſunt illi potires quàm creditores, qui perſonali tantùm actioni incumbunt. L. eos. C. qui potiores in pig.

h) Anno 13. Ed. 1.

i) Brook Abridg. tit. execut. n. 172. Do. & Stu. lib. 2. c. 10.

k) Brook. d. n. 172.

l) Brook. vbi ſupr. Doct. & Stud. lib. 2. c. 10.

m) Brook. d. tit. exec. n. 172.

for then it is not in the power of the executor to discharge an other obligation, for the which no action is brought in preiudice of the former suite[n]: But if there be two obligations, and the two seuerall creditors bring seuerall actions against the executor, he that first obtaineth iudgment, must be first satisfied[o].

n)Brook.d.n.172.

o)Brook.eod.n.172.

Fiftly †, after obligations (supposing sufficiencie of goods) debts due vpon *simple billes*, or *merchant bookes*, or *other like specialties*, are to bee discharged[p]. 7

p)Doct.& Stud.lib.2. c.10.

Finally †, if the creditor haue *no specialtie*, or writing, it seemeth that the executor is not bounde by the lawes of this realme to pay the same, albeit he had assets in his handes (sauing seruãts wages[q]) because in euerie case where the testator might wage his lawe, no action lieth against the executor[r]. Howbeit an action of the case may be brought against the executor, vpon the promise or assumption made by the testator in his life time by worde onely without writing, if there be assets[s]: But if there be no assets to satisfie all these aforesaide creditors, then obseruing the order aforesaid, beginning with the paiment of the debt due to the prince, and so forward, I suppose it is a discharge against the rest[t]; otherwise it is daungerous to the executor, if hee pay debts without specialtie before those debts which are due vpon specialtie, or if hee discharge obligations before iudgements[v], &c. 8

q)Brook.tit.exec.n.87 163.

r)Termes of law. verb. executor.

s)Brook.tit.executor. n.171.

t)Quod facto inuentario sine impedimento procedit, alias secus si respiciamus ius ciuile. L. scimus.§.& si præfatam, sdque ob præsumptam fraudem.

v)Brook.Doct.& Stud. locis supradictis.

But here it may be demaunded, what if the testator were indebted to the executor, whether may

9 may † the executor allowe his owne debt in preiudice of other creditors? By the ciuill[x] and our eccleſiaſtical[y] lawes, he is in the ſame caſe as other like creditors: and I ſuppoſe alſo that by the lawes of this realme, he may allow his owne debt in preiudice of other like creditors[z], in caſe he haue made an inuentarie.

x) L. ſcimus. §. in computatione. C. de iure delib.

y) c. ſtatutum. §. ſtatuimus. de teſta. lib. 3. prouincial. conſt. Cant.

z) Plowd. in caſ. inter Woodward. & Darcy. licet contrarium teneat Brook. tit executor. n. 57. 59. 112. 114. 118. cuius opinio communiter hodie reprobatur, vt non ſemel mihi nunciarunt iuriſperiti huius regni Angliæ, non pauci, nec mediocriter docti.

Furthermore it is to be noted in this place,

10 that † if the executor pay to ſome of the creditors part of the debt due by the teſtator, and receiue an acquittance for the whole, as if the teſtator be indebted to one in fortie poũd, wherof the executor paieth but ten pound, and neuertheleſſe taketh an acquittance of the whole fortie pounde, this acquittance ſhall not preiudice anie other creditor, but for ten pounde onely[a].

a) Brook. tit. aſſets. n. 1. & tit. executor. n. 8

Moreouer, it is to be noted, that this hath beene deliuered and receiued for lawe, viz. that

11 if † the executor did pay with his owne money ſo much of the teſtators debts, as the value of the teſtators goods or cattels did ariſe vnto, and retaine in his handes the teſtators goodes or cattels, then ſuch paiment ſhould not preiudice the other creditors, to whom the teſtator was indebted, but ſhould charge the executor as aſſets[b], and therefore that it behoueth the executor to alienate the goods of the teſtator for the paiment of his debts, if he would bee ſafe from paying any more debts then the goodes of the teſtator did extend vnto[c]. Howbeit, at this preſent the contrarie opinion ſeemeth to preuaile in this our realme, namely, that the executor

b) Brook Abridg. tit. aſſets. n. 6. 8. tit. exec. n. 116. 150. tit. adminiſtr. n. 38. 37. 51. Lindw. in c. ita quorundam. verb. ſibi. de teſta. lib. 3. prouincial. conſtit. Cant.

c) Brook. & Lindw. vbi ſupra. Quibus adiungas Sichard. in L. vlt. §. & ſi præfatam. n. 11. 12. C. de iure delib.

paying the iuſt value of the teſtators goodes to the creditors, maie retaine the ſame goodes in his hands, which neuertheleſſe ſhall not charge the executor as aſſets [d].

d) Dyer. fol. 2. & fol. 187

Concerning † Mortuaries, it is enacted by authoritie of Parliament as followeth [e]. No † parſon, vicar, curate, pariſh prieſt, ne any other ſpirituall perſon, nor the fermers, bailifes, ne leſſees, take, demaund, or receiue of any perſon or perſons within this realme, for any perſon or perſons dying within this Realme, for anie Mortuarie or corſe preſent, ne any ſumme or ſummes of money, ne any other thing for the ſame, more then is hereafter mentioned, ne alſo ſhall conuent or call any perſon or perſons before the Iudge ſpirituall, for the recouerie of any ſuch Mortuaries or corſe preſent, or any other thing for the ſame, more then is hereafter mentioned, vpon paine to forfait for euery time ſo demanding, receiuing, taking or conuenting, or calling any ſuch perſō or perſons before any ſpirituall Iudge, ſo much value as they ſhall take aboue the ſame limited by this acte. And ouer that fortie ſhillings to the partie grieued contrarie to this act; for the which forfaiture, the partie ſo grieued contrarie to this acte, ſhall haue an action of debt by write, will, plaint or information, in any of the Kinges Courtes wherein no wager of law &c. ſhalbe allowed. 12 13

e) Stat. H. 8. an. 21. c. 6.

First † it is enacted, that no maner of Mortuarie ſhall be taken or demaunded of any ſuch perſon whatſoeuer he be, which at the time of his death hath no moueable goodes vnder the 14

value

value of ten marke.

15 Alſo † that no Mortuarie ſhall be giuen or demanded from henceforth of any maner perſon, but onely in ſuch place as a Mortuarie heretofore hath bene vſed to be paid and giuen, and in thoſe places none otherwiſe but after the rate and forme hereafter mentioned.

16 Ne † that any perſon pay Mortuaries in more places then one, that is to ſay, in the place of their moſt dwelling and habitation, and there but one Mortuarie.

17 Nor † no parſon, vicar, curate, pariſh prieſt, rother, ſhall for any perſon dying, or dead, & being at the time of his death of the value of moueable goods of ten markes or more, cleerely aboue his debtes paied, and vnder the ſumme of thirtie pounde, take for any Mortuarie more then three ſhillings foure pence in the whole.

18 And † for a perſon dying or dead, being at the time of his death of the value of thirtie poũd or aboue, cleerly aboue his debts paid in moueable goods, and vnder the value of xl. pounde, there ſhall bee no more taken and demaunded for a Mortuarie then ſixe ſhillings eight pence in the whole.

19 And † for anie perſon dying or dead, hauing at the time of his death of the value in moueable goods of xl. poũd or aboue, to any ſumme whatſoeuer it be cleerly aboue his debts paide, there ſhal be no more taken, paied or demanded for a Mortuarie, then ten ſhillings in the whole.

20 Prouided † that no woman being couert baron, ne child, nor for any perſon not keeping

„ houſe any Mortuarie be paied, ne that any par-
„ ſon,vicar,curate,pariſh prieſt or other, aske,de-
„ maunde, or take for any ſuch woman,childe,or
„ for any perſon not keeping houſe, dying or
„ dead, any maner of thing or money by way of
„ Mortuarie.

„ Ne alſo for any warfaring man , or other
„ that dwelleth not, ne maketh reſidence in the
„ place where they ſhall happen to die , but that
„ the Mortuarie of ſuch warfaring perſons be an-
„ ſwerable in places where Mortuaries be accu-
„ ſtomed to be paied, & in maner and forme,and
„ after the rate before mentioned, and no other-
„ wiſe in place or places where ſuch warfaring
„ perſons at the time of their death had the moſt
„ habitation houſe and dwelling places, and no
„ elſe where.

„ Prouided † alwaies, that it ſhall bee lawfull 21
„ to all maner parſons,vicars,curats, pariſh prieſts
„ and other ſpirituall perſons,to take and receiue
„ all manner ſumme of money , or other thing,
„ which by any maner of perſon dying ſhall for-
„ tune to be diſpoſed,giuen or bequeathed vnto
„ them,or any of them,or to the high altar of the
„ Church,this act or any thing therin mentioned
„ notwithſtanding.

„ And be it,&c.that no Mortuaries or corſes
„ preſents , or any ſumme or ſummes of money,
„ or other thing for any Mortuarie or corſe pre-
„ ſent,ſhall be demaunded,taken,receiued,or had
„ in the parts of Wales,nor in the marches of the
„ ſame,nor in the townes of Calice,or Berwicke,
„ nor the marches of the ſame , but onely in ſuch

parts

parts and places of Wales, marches, & townes „
aforeraide, where Mortuaries haue beene accu- „
ſtomed to bee taken, and paied: and in thoſe „
parts & places, no mortuaries or corſes preſents, „
ne any other thing for Mortuarie or corſe pre- „
ſent, from henceforth ſhall bee demaunded, ta- „
ken, receiued or had, but onely after the forme, „
order, and maner aboue ſpecified in this preſent „
acte, and none otherwiſe, ne of any other per- „
ſon or perſons then is limited in this preſent act, „
and none otherwiſe, vpon paine aboue contai- „
ned in this preſent act. „

Prouided alſo, that it ſhall be lawfull to the „
Biſhops of Bangors, Landaffe, Saint Dauids, „
and Saint Aſſe, and likewiſe to the Archdeacon „
of Cheſter, to take ſuch Mortuaries of the „
Prieſts within the Dioceſſes and iuriſdictions „
as heretofore hath beene accuſtomed. „

Prouided alwayes, that in ſuch places „
where Mortuaries haue beene accuſtomed to „
bee taken of leſſe value then is aforeſaide, that „
no perſon ſhall bee compelled to pay in anie „
ſuch place, anie ſuch Mortuarie then hath bene „
accuſtomed, ne that any mortuarie in ſuch „
place ſhall bee demaunded, taken, receiued, or „
had of any ſuch perſon or perſons exempt by „
this acte, nor in any wiſe contrarie to this acte, „
vpon paine afore limited. „

Of making an account, and first of the necessitie thereof.

1 *Diuerse reasons wherefore executors are to account.*
2 *Whether the executor be subiect to account, being released by the testator.*

§. xvii.

HEre many things may be considered[a], namely, *howe needfull it is* that executors should be accomptable; *To whom* the account is to be made; *within what time*; *in what manner*, and *what effectes* the same hath.

a) Super hac materia vide. Io. de Can. in Tract. de executor. vlt. vol. §. nouissimum. n. 4. & Io. Olden. consi. Tract. tit. 8.

How † requisite and needfull a thing it is, 1
that executors should be charged with the making and rendering of an account, the vnfaithfull dealing of a great sorte of faithlesse executors, to the vtter vndoing and spoiling of many fatherlesse and friendlesse children, it is a proofe ouer well knowen[b]. Surely if it stand with reason, that stewardes, receiuers, bailifes, tutors, factors, and such as haue to deale for other persons, shoulde bee accountable of their stewardship, receiuership, and their other offices[c], with greater reason may it be mainteined, that an executor should bee subiect to account, rather then they: for they for the most part haue to deale for such as be liuing, who may haue an eie to their dooings: but an executor hath to deale

b) Argument. à §. quoniam in Authentic. vt hi qui oblig.

c) Io. de Canib. in d. §. nouissimum. n. 1. Menoch. de arb. iud. lib. 2. cas. 209.

deale for a dead perſon, who can neither ſee nor heare, if his executor deale vniuſtly. Again, if the executor haue well and faithfully executed his office, and fully diſcharged the truſt repoſed in him: what ſhould moue him that hee ſhould not willingly make a due account thereof; and thereby obtaine an acquittance, and be deliuered from the burthen laid vpon him[d]? On the contrarie, if hee haue plaied the vniuſt ſteward, much rather in that caſe, ought he to be vrged & compelled to make his account, that his fraude and deceite being detected, hee may be iuſtly puniſhed, and others by his puniſhment premoniſhed[e]. By this alſo that aſwell the ciuill lawes, as the eccleſiaſticall lawe, be ſo preciſe in making of inuentaries, wee may learne the neceſſitie in making of an account: for if executors were not accountable, the vſe of inuentaries were to little purpoſe[f].

d) Io. Oldendorp. Tract. de executor. vlt. vol. tit. 8.

e) Olden. vbi ſupra.

f) Io. de Canib. in d. §. nouiſſimum.

To conclude, all equall lawes of euery well gouerned common wealth, haue fauoured the execution of teſtaments, and laſt willes of men deceaſed, and haue had ſpeciall care that they ſhould not be fruſtrated: and therefore no man can with ſafe conſcience, ſpeake againſt the rendering of an account, or ſeeke immunitie from the ſame[g]. Inſomuch that if the teſtator ſhould diſcharge his executor from making an accoũt: yet neuertheleſſe, if the executor deale fraudulently, the Ordinarie may in his diſcretion, exact an account at his hands for the reformation of ſuch fraude[h]: for it is not to be preſumed, that the teſtator in graunting to the executor *immunitie*

g) Old. d. Tract. tit. 8.

h) Lind. in c. religioſã. verb. rationem. de teſtam. lib. 3 prouincial. conſtit. Cant. Io. de Athon. in magna gloſſ. in Legatin. libertatem. de exec. teſtam. Io. de Canib. & Io. Olden. locis ſuperius citatis.

nitie from making an account, did thinke that the executor would deale vniustly and fraudulently[i], and so did not pardon any such vniustice or fraude, whereof he had no conceite[k], but rather hoped that the executor would discharge his office with all fidelitie, so that there should not need any account, and in that respect onely (I meane in the case of his fidelitie) did acquite him from rendering of an account[l].

i) Lind. Io. de Canib. & Io. Olden. vbi supra.
k) L. si quis. ff. de lib. leg.
l) Lind. vbi supra.

To vvhom the account ought to be made.

1 *The account is to be made to the Ordinarie.*
2 *Whether the account is to be made to the creditors or legataries.*
3 *Whether the account is to be made to the coexecutor.*

§. xviij.

THe† account is to be made by the executor testamentarie to the Bishop or Ordinarie, to whome the probation of the testament appertaineth[a], who therefore not vnaptly may be tearmed the executor of executors, becaus he examineth the account of euery executor; and the father of the fatherlesse, for that to poore Orphanes he is in steed of a father[b], in prouiding how they may obtaine that which is left vnto them, by the testament of their father or other person deceased. 1

a) Clem. Vnic. de testa. c. statutum. §. & postq. de testam. lib. 3. prouincial constit. Cant. Io. de Canib. de executor. vlt. vol. 2. particula. §. nouissimum. per L. nulli. C. de Epis. & cleric.
b) Io. de Canib. in d. §. nouissimum. n. 9.

And

2 And albeit † it seemeth that the executor is not tied to make an account to the legataries or creditors extraiudicially[c], yet I suppose that at the instance or promotion of such legataries & creditors inuocating the office of the Iudge, he may be compelled to render an account to the Ordinarie iudicially[d].

c) Io. de Canib. in d. §. nouissimum.

d) Per ea quæ inferius scribuntur, eod. part. §. 20.

3 To † this question, whether an executor be bound to make an account to his coexecutor, it is answered, that extraiudicially an executor may exact an account of his coexecutor, but not in iudgement[e]: but the ordinarie may call them both, or either of them to a iudiciall account[f].

e) Lind. in d. c. statutũ. §. & postquam. verb. rationem. in fin. gloss. suæ ibidem.

f) L. 2. de admĩstr. tut. C. Lind. vbi supr.

Of the time of the account.

1 *The time is left to the discretion of the Ordinarie.*
2 *Of the generall and particular account.*

§. xix.

1 THe † time appointed for making of the account seemeth to be arbitrarie, that is to say, left to the discre-
2 tion of the Ordinarie[a]. And † although it may seeme that the executor ought not to bee called to a generall accoũt of his whole executorship, before he haue had sufficient time for the performance of the will[b] (which is a twelue month[c]:) Neuertheless in the meane time, if the executor doo not administer faithfully; or if the Ordinarie thinke it

a) Text. in c. statutum. §. & postquam. de testam. lib. 3. prouincial. constit. Cant.

b) Lindw. in d. §. & postquam. verb. congruè. & verb. rationem reddere.

c) L. nulli. C. de Episc. & cler. Boic. in c. tuã nobis. de testa. extra. Conar. in c. 3. eod. tit.

it conuenient, the executor may bee compelled to make a particular account[d], and so in diuers respects the lawe hath appointed the time diuersly.

But whatsoeuer the lawe hath determined herein, it is for the most part euerie where within this realme obserued, that the executors promise to the Ordinarie by vertue of their othe, to make a true and perfect account, whensoeuer they shal be thereunto called by the said Ordinarie[e], and therfore may be called to a generall account within the yeare[f]: yet I referre the reader to the seuerall stiles of seuerall Courts, for his further information in this behalfe.

d) Lind. in d.c. statutum verb. congruè. & verb. rationem reddere. Io. de Canib. de executor. vlt. vol. §. nouissimum. q. 10.

e) Text. in d. §. post q.

f) Io. de Athon. gloss. in Legatin. libertatem. verb. approbatam.

Of the maner of making an account.

1 *What proofe is requisite in the account.*
2 *Of the distribution of the residue.*
3 *Of the office of the ordinarie in the account.*
4 *What manner of expences are to bee allowed to the executor.*
5 *Of the citation in the account.*

§. xx.

IF we respect what is to bee performed by the executor, who maketh the account[a], he is not onely to declare what goodes and cattelles belonging to the testator, he hath receiued[b], and what debts and legacies he hath paied

a) De forma reddendi rationem præclarè Olden. in Tract. de executor. vlt. vol. tit. 8. & Menoch. de arb. iud. lib. 2. cas. 209.

b) Molineus in consuetud. Paris. §. 6. gloss. 6. n. 18.

1 paied for the teſtator: and to † make due proofe of euery paiment, that is to ſay, of leſſer ſummes by his othe, and of greater ſummes by other proofes[d], ſuch as the Ordinarie ſhall allowe of[e], but alſo if any thinge doo remaine of the ſaid goodes and cattels[f], (the funerals † toge-
2 ther with the debtes and legacies ſatisfied and diſcharged[g]) the ſame ought to be diſtributed, and conuerted *in pios vſus*[h]: neither ought the executor to applie anie part thereof to his owne priuate vſe, more then is giuen him by the teſtator, or which the Ordinarie ſhall allowe him for his laobur, or for the like conſideration[i]. But of this diſtribution of the reſidue (*in pios vſus*) there is but ſmall vſe in theſe daies, as well for that the reſidue is commonly left to the executors, as alſo for that the executors are afraid that ſome vnknowen debts due by the teſtator, ſhoulde afterwarde ariſe, and ſo the executor be compelled to pay the ſame out of his owne purſe.

If we reſpect what is to bee performed by the Ordinarie in the making of this account, I
3 ſuppoſe that it † dooth appertaine vnto his office, not onely to examine the account, and to ſee whether the ſame be rightly calculated, and whether the accomptant doo charge himſelfe with the receite of the whole goodes and cattels of the teſtator, and how much he hath diſburſed, either for funerals, debts, or legacies[k]: but alſo to haue a regard what maner of expences the accomptant requireth to bee allowed
4 vnto him: for † ſumptuous and delicate expen-

ces.

c) Molin. ibid.

d) Io. And. in addic. ad Specul. de Inſtr. edit. §. nunc verò. verb. quid ſi executor. Lind. in c. ſtatutum. verb. reddere rationem. lib. 3. prouin. conſtit. Cant. Io. de Athon. in Legatin. libertatem. de executor. teſtam. Maſcard. Tract. de probac. verb. expenſæ. concl. 722.

e) Menoch. d. caſ. 209. Old. de executor. vlt. vol. tit. 8. Maſcard. de probac. concluſ. 720.

f) L. cùm ſeruus. ff. de cond. & demon.

g) Magna charta. c. 18.

h) c. ſtatutum. §. ſtatuimus de teſta. lib. 3 prouincial. conſtit. Cant. c. cum tibi de teſta. extr Plowd. in caſ. inter Norwood. & Read. Doct. & Stud. lib. 2. c. 10. circa medium.

i) Text. in d. §. ſtatuim⁹, Quod tamen intellige prout ſupra ſcripſi ead. part. §. 1. in fin.

k) Menoch. d. caſ. 209. Olden. d. tit. 8.

ces are not to be allowed, but honest and moderate, according to the condition of the persons[l]. And after due examination of the saide account, the Ordinarie finding the same to bee true and perfect, may pronounce for the validitie thereof, and so acquite the executor, so farre forth as appertaineth to the ecclesiastical court[m]. But if vppon the examination of the saide account, it doo appeare, that the executor hath not dealt faithfully, the account is to bee reiected[n].

But whether † we respect the office of the accomptant, or of the ordinarie, this is perpetuallie to be obserued, that the creditors to whom the testator did owe any thing, and the legataries to whome the testator did bequeath anie thing, and all others hauing interest are to be cited to be present at the making of the saide account[o], otherwise the account made in their absence, and they neuer called, is not preiudiciall vnto them[p]. 5

l) d.c.statutum.§.statuimus. Old.d.tit.8.n.5.

m) De qua re attendẽdus est cuiusque fori stilus.

n) Vide infr.§.pẽx.

o) Specul.de Instr.edit. §.nunc vero aliqua. n.45. Lind.in d.c.statutum.§.& postq̃. verb. ordinarios.

p) L.de vnoquoque. ff. de re iud.& DD.ibid.& supr.ead.part.§.14.

Of the ende and effect of an account.

1 *The making of an account, ordained in fauourable regard of testaments.*
2 *The effect of a perfect and iust account.*
3 *The effect of an vnperfect account.*

§.xxj.

1 THe † ende for which it is ordeined, that euery teſtamentarie executor ſhould be ſubiect to make an accoũt, is this, that the lawfull teſtaments and laſt willes of them which depart this life, ſhould be fullie effected and accompliſhed, according to their true and honeſt intents, & that the occaſion of defrauding the dead man, & miſpen ding his goods by vnhoneſt executors, might be preuented [a].

2 The † effect which ariſeth of a true and iuſt account, is this, the executor hauing well and faithfully performed his office, and made his account accordingly, ought to be acquited & diſcharged from further moleſtation and ſuites, as one that hath fully adminiſtred and finiſhed his office [b], neither is he to bee called by the Ordinarie to any further account [c].

3 But this finall † diſcharge & acquittance can not be obteined, vntill the executor haue fully adminiſtred & accompted. And if any inferior Iudge (I meane vnder the degree or dignitie of a Biſhop) do grant vnto any executor letters of acquittãce or final diſcharge, before a lawful account of full adminiſtration and faithful execution be made, that Iudge is *ipſo facto* ſuſpended *ab ingreſſu eccleſiæ* by the ſpace of ſixe moneths [d]. Beſides that, the acquittance it ſelf doth not benefite the executor, when it appeareth that hee hath not fully and faithfully adminiſtred [e].

a) Io. de Canib. Tract. de exec. vlt. vol. §. noueſſimum. Io. Olden. eod. Tract. tit. 8. & ſupr. eod. part. §. 17.

b) Menoch. d. caſ. 209. in fin Brook Abridg. tit. admiſtr. n. 14.

c) L. Semel. C. de Apoch. Olden. de exec. vlt. vol. tit. 8. n. 17.

d) c. fin. de teſtam lib. 3 prouincial. conſtit. Cant. in fin.

e) Lind. in d. c. fin. verb. acquietanciarum.

Of

Of the executor refusing the executorship, and what he is to take heed of.

1 *The executor resolued to refuse, must not meddle as executor.*
2 *Who is said to meddle as executor, or not.*

§.xxij.

IF the executor named in the testamẽt resolue not to stand to the executorship, but to refuse the same; then must he beware that he do not administer the goodes of the deceased as executor, for hauing once administred as executor, he may at anie time after be compelled to vndergoe the burthen of an executor[a], and also may be sued as executor by the creditors of the testator, though he cãnot sue others as executor, for that he hath not the will vnder the ordinaries seale[b]. 1

A man is then saide to administer as executor, so that thereby he may be cõpelled to stand to the executorship, when he dooth performe those acts which be proper to an executor[c], as to pay the debts due by the testator, or to receiue any debtes due vnto the testator, or to giue acquittances for the same[d], with other like actes[e]. 2

But if a man do those acts, which are not proper to an executor, he is not said to haue administred as executor to the effect aforesaid[f], as to feed the cattel of the deceased, least they should perish[g], or to take into his custodie the goodes of

a) Panor. in c. Iohãnes. Boic. in c. tua nobis. de testa. extr.
b) Perkins. tit. testamẽt. fol. 93. Plowd in cas. inter Greisb. & Fox. Brook. tit. exec. n. 49.
c) L. pro hærede, ff. de acquir. hæred. Mantic. de coniect. vlt. vol. lib. 12. tit. 9. n. 18.
d) Mascard. de probac. concl. 44. n. 5. 29. 45. Fitzh. Abridg. tit. executor. n. 38.
e) Aditio hæreditatis quomodo probatur copiosè Masca. Tract. de probac. qui per multas cõclusiones hanc materiam prosequitur, in verb. aditio.
f) Mantic. de coniect. vlt. vol. lib. 12. tit. 9. n. 18
g) d. L. pro hærede. Fitzherb. tit. exec. n. 45.

of the deceaſed, to the ende they may bee ſafe from being ſtolne or purloined[h], or to diſpoſe of the teſtators goods about the funerals[i], for theſe be deedes of charitie common to euerie chriſtian, and not peculiar to an executor[k]. Likewiſe to make an inuentarie of the goods of the deceaſed, is not to adminiſter as executor[l], or to deliuer to the wife her conuenient apparel[m], or to take the teſtators horſe & ride him, or to vſe him as his owne, ſuppoſing him not to be the teſtators but his own[n], or to take of the goods of the teſtator by the lawful & vnfraudulent gift of the teſtator[o]: And generally, whoſoeuer as a meere treſpaſſer, entereth into the goods of the teſtator, whether it be to things liuing, as horſe, kine, ſheepe; or dead things, as pots, pannes, diſhes, conuerting the ſame to his owne proper vſe, and not to the vſe of the teſtator, as to the paiment of the teſtators debts or legacies, doth not adminiſter as executor[p]

Howbeit in theſe caſes and ſuch like, whoſoeuer feareth to be adiudged executor, adminiſtring of his own wrong, the moſt ſafe courſe is, not to meddle at all, but vtterly to abſtaine from all manner of vſe of the teſtators goodes, and namely, let him beware that he do not ſell any goodes, or kill any cattell of the deceaſed[q].

h) d. L. pro hærede.

i) Ead. L. pro hærede. & ibi DD. Lind. in d. c. ſtatutum. Fitzh. tit. execut. n. 38. Brook. tit. adminſtr. n. 6. 28.

k) L. non hoc. C. vnde legitimi. d. L. pro hærede. Fitzh. tit. exec. n. 38.

l) Mantic. de coniect. vlt. vol. lib. 12. tit. 9 n. 15. Iaſ. & Alex. in L. vlt. §. ſin autem. C. de iure delib. quæ opinio communis eſt aduerſus Bar. & eius ſequaces. vt refert Maſcard. de probac. concl. 48. ſed cum diſtinctione, vt ibi per eundem.

m) Brook. tit. adminſtr. n. 6. Tu autem vide Maſcard. de probac. concl. 44. n. 46. &c.

n) Brook. tit. adminſtr. n. 28. Huc. pertinet quod ſcriptum reliquit Maſcard. de probac. concl. 45. n. 46. &c.

o) Brook. tit. executor. n. 162. Maſcard. d. cõcl. 45. n. 29. &c.

p) Brook. tit. executor. n. 165. tit. adminſtr. n. 42.

q) Brook. tit. adminſtr. n. 26. Quamuis iure ciuili certo certius eſt, eum, qui res perituras, quæ videlicet, ſeruando ſeruari non poſſunt, diſtraxit, in ea cauſa eſſe, vt pro hærede non geſſerit, quia hoc non adeundi animo factum eſſe præſumitur. d. L. pro hærede.

THE SEVENTH PART OF THIS TESTAMENTARIE TREATISE,

DECLARING BY WHAT MEANES TESTAments or last willes become voide.

The Paragraphes or Chapters of the last part.

BY what meanes testamentes or last willes become void. §.1.
Of testamẽts made by feare. §.2.
Of testamẽts made by fraud. §.3
Of testamentes made by flatterie. §.4.
Of errour. §.5.
Of vncertaintie. §.6.
Of vncertaintie, either becauſe no certaine perſon is named, or ſome being named, none of that name is to be found. §.7.
Of vncertaintie ariſing for that there be diuerſe perſons of one name. §.8.
Of vncertaintie by occaſion of alternatiue or diſiunctiue ſpeech. §.9.

Of vncertaintie respecting the thing bequeathed. §.10
Of vncertaintie respecting the time or date of the testament, viz. where two testaments appeare, and it is vncertaine whether is the latter. §.11.
Of an vnperfect testament. §.12.
Of the defect in the testators meaning. §.13.
Of a later testament. §.14.
Of reuoking the testament made. §.15.
Of cancelling the testament made. §.16.
Of the alteration of the state of the testator. §.17.
Of forbidding or hindering the testator to make an other testament. §.18.
When he that is named executor, cannot or will not be executor. §.19.
Of ademption of legacies. §.20.
Of transtation of legacies. §.21.
Of diuerse meanes whereby legacies are lost, considerable in the person of the legatarie as of enmitie, &c. §.22.
Of the death of the legatarie before the legacie be due. §.23.
Of the destruction of the thing bequeathed. §.24.

The word Roughe could truffe or Roughe could goode is of a doubtfull signification & is otherwise read then it ought to be read in vsuall speach by reason of a bad edition of the booke taken out of a bad

By

BY WHAT MEANES teſtaments or laſt vvilles become voide.

The ſeuenth part.

1 *Teſtaments loſe their force two wayes.*
2 *By what meanes teſtaments are voide from the beginning.*
3 *By what meanes the teſtament once good, is made voide afterwards.*
4 *Howe we may knowe when the teſtament is voide from the beginning.*

§. i.

1 HItherto of thoſe things which apperteine to the *making and accompliſhing* of teſtaments: nowe of ſuch things as tende to the *diſſolution therof.*

Albeit the meanes whereby teſtaments and laſt willes doo looſe their force, be many[a]: yet

a) De quibus Vigelius in ſua method. iur. ciuil. lib. 9. c. 5. cum ſeq.

yet they may be reduced to two [b].

The firste is, when † there is some *originall defect* or corruption in the testament [c], which may happen diuers waies, either becauſe the *testator is such a person as cannot make a testament or last will* [d], or becauſe the *thinges bequeathed are not deuisable by will* [e], or becauſe the *maner of the disposition is vnlawful* [f], or for that *the person named executor is incapable thereof* [g], or for some other cauſe hereafter expreſſed [h]: and ſuch a teſtament or laſt will being voide originally, or from the beginning, is called *Nullum*, ſomtimes *iniustum*, or *non iure factum* [i]. 2

The other meanes is, when † the teſtament or laſt will being free from originall fault, *dooth afterwards become voide* [k]. And this alſo may happen diuerſe waies, as by the making of a *later testament* [l], or by *reuoking or cancelling* of that which is made [m], or by *alteration of the state* of the teſtator [n], or *by forbidding or hindering* the teſtator to make another teſtament [o], or if he that is named executor *will not, or doth become vnable to be executor* [p], and by many other meanes more particularly ſhewed hereafter [q]. And this kind of teſtament which once being good, becommeth voide *ex post facto*, is ſometimes called *ruptum*, ſometimes *irritum* [r]. 3

Touching the former of theſe voide teſtaments, foraſmuch † as we haue alreadie declared who may make a teſtament, what thing may be diſpoſed, what forme is lawfull, and who maie be executor or legatarie: and on the contrarie, what perſon can not make a teſtament, what thing

b) Viglius in tit. quib. mod. teſta. infir. Inſtit.

c) L. ſi quæramus. ff. de teſta.

d) Supra part. 2.
e) Supra part. 3.
f) Supra part. 4.

g) Supra part. 5.
h) Infr. §. prox. cum §§. ſeq. vſque ad §. 14.

i) Minſing. & Vigl. in d. tit. quib. mod. teſta. infir. Inſtit.

k) Vigl. in d. tit. quibus mod. teſta. infir.
l) §. poſteriore. Inſtit. quib. mod. teſta. infir. & infra §. 14.
m) L. 1. de his quæ teſta. del. ff. & inf. §§. 15. 16.
n) §. alio Inſtit. quibus mod. teſta. infir. & infra §. 17.
o) Tit. ſi quis aliquem teſtari prohib. ff. & C. & infra §. 18.
p) L. 1. ff. de iniuſt. rup. & irrit. teſtam. & infr. §. 19.
q) Infr. §. 20. cum reliquis §§ vſque ad finem
r) Tit. de iniuſt. rupt. & irrit. teſtam. ff. d. §. alio Inſtit. quib. mod. teſta. infir.

thing cannot bee deuised, what forme is not lawfull, and what person is not capable of an executorship or legacie, it is a matter of little labour, and lesse difficultie, by examination of the premisses, to collect and discerne when the testament is originally voide, either in respect of the testator, or of the thing bequeathed, or of the forme of the disposition, or of the person of the executor or legatarie. Whereunto it maie be added, that the testament is originally voide, or at the least voidable by exception, when the testator is compelled *by feare*[s], or circumuented *by fraude*[t], or ouercome *by immoderate flatterie*[v], to make the same. It is also voide from the beginning, sometimes by reason of *error*[x], sometimes by reason of *vncertaintie*[y], and sometimes by reason of *imperfection*[z], and sometimes because the testator hath not *animū testandi*[a], a meaning to make his testament or last will.

s) Infra §. prox.
t) Infra §. 3.
v) Infra §. 4.
x) Infra §. 5.
y) Infra §. 6. cum seq.
z) Infra §. 12.
a) Infr. §. 13.

Touching the other kinde of these testamentes, such I meane as were good at the first, but do become voide afterwards, we shal speake more particularly hereafter.

Of the testament made by feare.

1 *Exception of feare destroieth the testament.*
2 *Whether this exception be preiudiciall to anie other then to the author thereof.*
3 *What if the testament be confirmed with an othe.*
4 *What if the feare be not of present hurt.*
5 *What if the testament bee made after the time of*

the violence offered, and not at that instant.

6 *Whether the testament made by feare bee voide,* ipso iure.

7 *Vaine feare hindereth not the validitie of the testament.*

8 *The testament confirmed after feare be past, is good.*

9 *The testament is good, sauing in fauour of the author of this feare and his complices.*

10 *What if the testator protest that he made his testament being compelled by feare, whether dooth this protestation make voide the testament.*

§. ii.

NOthing is more contrarie to free consent then feare[a]: worthilie † therefore is that testament to bee repelled which is made vpon iust feare[b], which conclusion is diuersly both extended and limited. 1

The first extension is, that the testament made by feare is vneffectuall, not † onely in respect of that person who put the testator in feare, but also in respect of other persons also[c]; albeit ignorant of that feare wherewith the testator was constrained in that behalfe[d]. 2

Secondly the † testament is ouerthrowne by the exception of feare, albeit the testator did with an othe confirme the same, during the feare[e]. For where a man being ouercome with feare, to the ende hee may escape that daunger, doth sweare with his mouth to performe that thing, 3

a) Nihil consensui. de reg. iur. ff.

b) Bar. in L. fin. si quis aliquem testari prohib. ff. Ias. & Sichard. in Rub. si quis aliquem. C. quamuis communi Doctorum opinione, huiusmodi testamentū non sit ipso iure nullū. vt per Graff. Thesaur. com. op. §. testm. q. 83. Soarez. lib. rec. senten. verb. testam. n. 56. 57.

c) Gloss. in Rub. si quis aliquem prohib. ff. Bar. in d. L. fin. Boss. Tract. var. tit. de his qui prohib. aliquem testari. §. 4.

d) Bar. & Boss. vbi supra contrariam tamen opinionem tenent Ias. & Sichard. in Rub. si quis aliquem. C. sed distingue, vt infra in limitac. 4.

e) c. quamuis. de pactis. lib. 6.

thing, which he intendeth not in his heart: this othe dooth not giue any ſtrength to that acte[f]; but contrariwiſe the act is ſo much the weaker, by how much the ſuſpition of feare by this extorted othe is made the ſtronger.

4 Thirdly †, not onely that teſtament is depriued of lawfull force, which the teſtator is conſtrained to make by preſent force and violéce, but that alſo where the teſtator is not only threatned with future euils, being ſuch as maie moue iuſt feare[g]: although by the ciuill lawe in other reſpects, that is to ſay, of greater or leſſer puniſhment of the authour of this feare, there is great difference, whether hee exerciſe violence againſt the teſtator, or threatnings onely, as alſo whether the violence bee open or ſecrete[h], of which puniſhment we haue no great vſe in Englande except it bee for forgerie of willes[i].

5 Fourthly, albeit † the teſtament were not made at the time of the violence or threatnings executed, but afterwards: yet the cauſe of the feare ſtill enduring, it is of no leſſe force then if it had bene made at the time of the former beating or threatnings[k].

The limitations of this former concluſion
6 are theſe. Firſt, the teſtament † made by feare is not voide *ipſo iure*, but voidable by the helpe of excepton[l]: the reaſon is, becauſe he that doth an act through feare, doth after a ſort conſent[m], that is to ſay, of two euils he chuſeth the leſſe[n], and is willing rather to make a teſtamēt, then to incurre the perill threatned[o]. And albeit ſome

f) DD. ind. c. quamuis. Felin. in c. ſi vero. de iureiur. extra. n. 8. declar. 4.

g) Sichard. in d. Rub. ſi quis aliquem. C. n. 1. Iaſ. in §. quadrupli. Inſtit. de action. vbi tradit quinque genera metus.

h) Sichard. in d. Rub. Iul. Clar. §. falſum. & pract. criminal. q. 83.

i) Stat. Eliz. an. 5. c. 14.

k) Zaſ. in L. ſi ob turpē. ff. de cond. indeb. Peckius. Tract. de teſta. coniug. lib. 1. tit. 9. n. 7.

l) Bar. in L. fin. ſi quis aliquem teſtari, phib. ff. Are. in L. 1. ff. de teſta.

m) L. ſi mulier. § pen. ff. quod me. cauſa.

n) Weſenb. in tit. quod met. cauſa. ff.

o) Weſenb. ibid.

be of this opinion, that the testament made by feare is voide, *ipso iure*; and that in this case a constrained will is no will, being rather *noluntas* then *voluntas*[p], yet the common opinion is against them[q], vnlesse the coaction be not conditionall, but precise, necessarie, and ineuitable[r].

The second limitation is, when † the feare 7
is but a vaine feare[s] (for a iust feare onely, that is such a feare as may moue a constant man or woman, maketh voide the testament[t]; as the feare of death, or of bodily hurt, or of imprisonment, or of the losse of al or most part of goods, and such like feare) whereof no certaine rule can be deliuered, but is left to the discretion of the Iudge, who ought not only to consider the qualitie of the threatnings, but also the persons as well threatned, as threatning; and in the threatned the sexe, the age, the courage, or pusillaminitie: and in the person threatning, the power, the disposition, and whether hee bee a meere boaster, or performer of his threates[v].

Thirdly, if the † testator afterward, when 8
there is no cause of feare, doo ratifie and confirme the testament, I suppose the testament to be good in law[x].

Fourthly, where † it is saide that the testa- 9
ment is vneffectuall, as well in respect of the authour of the feare, as of others for whome he extorteth any benefite in the testament: yet if the testator of his owne accorde, do in the same testament bequeath any legacie to any other persons besides these afore named, the testa-

ment

p) Vasq. de succeſſ. crea. §. 17. requisit. 22. Ias. in Rub. si quis ali. quem testari prohib. C.

q) Vasq. d. § 17. n. 5.

q) Grass. Thesaur. com. op. §. testim. q. 83. Soarez. eod. lib. verb. testim. n. 56. 57. Mantic. de coniect. vlt. vol. lib. 1. tit 3. lib. 2. tit. 7.

r) Quia tunc omnino deest voluntas. Wesen. in tit. quod met. causa.

s) L. si quis ab alio. ff. de re. iud. L. vani de reg. iur. ff.

t) c. ad audientiam. c. cum dilectus de his quæ me. cum extra. Mantic. de coniect. vlt. vol lib. 2. tit. 7. n. 6.

v) Menoch. de Arb. Iud cas. 135. Mascar. Tract. de probac. concl. 1054. Idem Menoch. Tract. de præsump. lib. 3. præs. 126.

x) L. 2. C. de his quæ vi, &c. L. si ob turpem. ff de condict. indeb. Sichard. in L. si per vim. C. de his quæ vi, &c. n. 3.

ment in that reſpect is not vnlawfull[y].

10 Fiftly, if the† teſtator after the making of the eſtament, do affirme or proteſt generallie, that the teſtament by him made was done through feare: not expreſſing particularly by whom he was compelled thereunto, ſuch bare proteſtation doth not make voide the teſtament[z]: but if the teſtator doo expreſſe by whome hee was conſtrained, proteſting that he would gladly alter the teſtament, but for feare of the perſons by him named; by ſuch aſſertion the teſtament is voide, at the leaſt in the preiudice of thoſe perſons[a].

y) Bar. in d. L. fin. n. 3. ſi quis. aliq. ff. Bal. in L. 1. eod. tit. C. n. 7.

z) Bald. in d. L. 1. Mantic. de coniect. vlt. volu. lib. 2. tit. 7. n. 5.

a) Mantic. vbi ſupra. Sichard. in Rub. ſi quis aliquem teſtari prohib. C. n. 5.

Of teſtaments made by fraude.

1 *Fraude as deteſtable as force.*
2 *Whether all maner of deceit be euill.*
3 *What if the deceite be verie ſmall.*

§. iii.

1 FRaude † is no leſſe deteſtable in lawe then open force[a], wherefore when the teſtator is circumuented by fraude, the teſtament is of no more force, then if hee were conſtrained by feare[b].

2 Neuertheleſſe † when the deceit is not euil, but good, (for all deceite is not euill[c]) ſuch deceit doth not hinder the teſtament[d]: for example, the teſtator intending to beſtowe all his goodes

a) Olden. de action. claſſ. 5. fol. 518. in actiõ. ex teſtamento.

b) L non enim. de inoffic. teſta. L. 1. de excep. doli. ff.

c) Zaſi in tit. de dolo malo. ff.

d) Bald. in L. 1. ſi quis aliquem teſtari prohib. C. & Sichard. in Rub. ibidem.

goodes vpon some vile and naughtie person, omitting his honest wife and dutifull children; if the wife or children beguile the testator, perswading him that that lewde person is dead, or by some other meanes deceiue the testator, and so procure themselues to be made executors, or vniuersall legataries: this deceit is not reproued as euill, and therefore the testament is not to be repelled as vnlawfull [e].

e) Bald. in d.L.1.n.17.

It seemeth † also, that the testament is not 3
void, when the deceite is verie light and small, such as can not beguile a prudent man or woman [f]: for as that feare onely is tearmed iust, and is able to ouerthrow the testament, which may ouercome a constant man: so that deceite onely seemeth sufficient to repell the approbation of a testament, which may deceiue a prudent person [g]. Howbeit (if this limitation bee true) yet as in that case it is left to the discretion of the Iudge to determine what feare is iust, respecting the qualitie of the threates, together with the disposition of the parties: so in this case the iudge comparing the deceite with the capacitie or vnderstanding of the person deceiued, may best discerne, whether it be such a deceite as maie ouerthrowe the testament or not [h].

f) c. cum dilectus. de his quæ vi vel metus causa extra.

g) Panor. in d.c.cum dilectus. n.4. Marsil. sing. 207. Alex. in apostil. ad lect. Bar. in L. eleganter. ff. de dolo. in prin. d.L.

h) Arg. d.c. dilectus.

How the testator may be induced by fraude too make or reuoke his testament, were it not that the craftie would put the same in practise, is a thing not altogether vnworthie the vnderstanding. But lest by instructing the better to auoide the same, I might also teach the euill affected

fected to follow the same: Sufficeth it, to refer the reader to that which hath beene spoken of captious willes[i], and to that which hereafter shall be vttered of forbidding or hindering the testator to make or alter his will[k].

i) Supra part.4.§.11.

k) Infra §.18.

Of testaments made by flatterie.

1 *Flatteringe persuasions not alwaies vnlawfull.*
2 *What if feare go before.*
3 *What if fraude be intermingled with flatterie.*
4 *What if the testator bee vnder the gouernment of the flatterer.*
5 *What if the flatteries be immoderate.*
6 *What if the testator haue made a former testament.*

§.iiij.

1 IT is not † vnlawfull for a man by honest intercessiõs and modest persuasions, to procure either another persõ or himselfe to be made executor[a]: neither is it altogether vnlawful for a man, euen with faire & flattering speeches, to moue the testator to make him his executor, or to giue him his goods[b], except in these cases following.

a) Olden. de action. class.5.fol.518.action. ex testamento.

b) L.vlt.si quis aliquem testari prohib. ff. & C. ac DD. ibidem.

2 The first case is, when † he that is made executor, did first beate or threaten the testator, and thereby did put him in feare: for then it is iustly suspected and presumed, that the testator is moued to make his testament, rather by feare then by faire speeches[c].

c) Peckius de testa. cõiug. lib.1.c.9.n.23. Ias. & Sichar. in L. vlt. C. si quis aliquem testari prohib. Menoch. de arb. Iud. cas.395.n.41.verb. hoc fortius.

The

The second case is †, when vnto flatterie is ioyned fraude or deceit[d]. 3

The third case is, when the testator, is a person of weake iudgement, and easie to be perswaded, and the legacie great[e]

The fourth † case like vnto this is, when the testator is vnder the gouernment of the perswader, or in his daunger[f]: And therefore if the phisition during the time of sickneſſe, be instant with the testator to make him his executor, or to giue him his goods, this testament is not good[g]; for the lawe presumeth, that the testator did it, least the phisition should forsake him, or negligently cure him[h]. So it is if the testator being sicke, his wife neglect to helpe him, or to prouide remedie for the recouerie of his health, and neuertheleſſe in the meane time busily applie him with sweete and flattering speeches, to make her his executrix, or to bestow his goodes vpon her: for in this case, the disposition is vneffectuall[i]. 4

The fift case is †, when the perswader is verie importunate[k]: for an importunate begger is compared to an extortor[l], and it is an impudent part still to gape and crie vpon the testator, and not to bee content with the first or seconde deniall[m]. 5

The sixt case is †, when the testator hath made another testament before, for then the later testament made at the instigation or requeſt of another person, is not good in preiudice of the former[n], as elsewhere is and shall be declared[o]. 6

Of

d) Sichard. in d. L. vlt. n. 13. Olden. de action. class. 5. fo. 518. Menoch. d. cas. 395, n. 41. Afflict. decis. 69.

e) Molin. in apostil. ad Dec. consil. 489.

f) Molin. in d. Apostil.

g) Peckius de testam. coniug. lib. 1. c. 9 n. 6. Bar. in L. Archiatr. de profess. & med. lib. 10. C

h) Peckius vbi supra. & in c. 17. eod. lib. Lucas de penna in d. L. Archiatri. iuxta illud Poetæ.

Garrulus ægroto medicus, si forte medetur:
Alter adest morbus, continuusque dolor.

i) Peckius. d. lib. 1. de testa. coniug. c. 9. n. 5. Mathe. de afflict. decis. 69.

k) c. fin. 20. q. 3. Abb. in c. præterea. de offic. delega. extr. Menoch. de Arbitr. Iud. cas. 395. n. 41. & latiùs Peckius. d. c. 9. n. 9.

l) Imol. in c. petitio. de iureiur. Peckius in d. c. 9. n 9. L. 1. §. persuadere. ff. de ser. cor.

m) Peckius vbi supra. Rebuff. Tract. de rescrip. ar. 2. gloss. 3.

n) Socin. Iun. consil. 14 vol. 2. Peckius in d. c. 9. versic. tertio.

o) Supra part. 2. §. 27. infra §. 14. limitac. 4.

Oferrour.

1 *Error may happen in diuerse respects.*
2 *Of error in the person of the executor or legatarie.*
3 *Of error in the name of the executor or legatarie.*
4 *Of error in the qualitie of the executor or legatarie.*
5 *Whether a false cause make voide the disposition.*
6 *Error in the thing bequeathed, manifold.*
7 *Of error in the proper name of the thing bequeathed.*
8 *Of error in the name appellatiue of the thing bequeathed.*
9 *Of the difference betwixt a proper name, and a name appellatiue.*
10 *An obiection with the answere.*
11 *Certaine cases wherein error in the name appellatiue is not hurtfull.*
12 *Error in the substance of the legacie, dooth destroie the legacie.*
13 *Error in the quantitie of the thing bequeathed, is not hurtfull.*
14 *Certaine cases wherein error in quantitie doth destroie the legacie.*
15 *Certaine cases wherein the error in the quantitie of the thing bequeathed as a certaine bodie is not hurtfull.*
16 *Error in the qualitie of the thing bequeathed, doth not destroie the legacie.*
17 *Error in the forme of the disposition, doth destroie the force thereof.*

§.v.

ERror dooth sometimes ouerthrow the disposition of the testator, sometimes not: Therefore that we may vnderstande whether this errour hurt or not, wee are to consider † 1 whether the error dooth respect the *executor or legatarie*, or the *thing bequeathed*, or the *forme of the disposition*: And if it doo respect the executor or legatarie, then whether the testator doo erre in the *person*, or in the *name*, or in the *qualitie* of the executor or legatarie.

When † the testator doth erre in the *person* 2 of the executor or legatarie, supposing him whom he maketh executor, or to whō he doth bequeath any legacie, to bee another person then he is, the disposition is voide[a]: for example, the testator intending to make Iohn at Stile his executor, or to giue to Iohn at Stile an hundred pound, he saith, I make Iohn at Noke my executor, or giue I to Iohn at Noke an hundred pound. In this case neither can Iohn at Stile, nor Iohn at Noke be executors, or obtaine the legacie[b]. The reason is this: Iohn at Noke is excluded, because the testator neuer thought it. Iohn at Stile is excluded, because the testator neuer spoke it: for meaning without speaking is nothing, and speech without meaning is lesse[c].

a) L. quoties. ff. de hæred. instit.

b) DD. in d. L. quoties

c) d. L. quoties. & L. in ambiguo. ff. de reb. dub.

When † the testator doth erre in the *name* 3 of the executor or legatarie, and not in the person,

son, such error doth not hurt [d], but in certaine cases: one is when the testator is blind; for then it is suspected that the testator dooth mistake the person, together with the name [e]. Another is, when the testator dooth erre in the name of his owne sonne [f], or of his father [g]: the reason is, for that this grosse error doth note the testator of follie [h]: But a foole, or he that is not of sound memorie cannot make a testament [i]: much more is the disposition voide, if the testator do erre in his owne name [k]: as if the testator say, I Peter make my testament, where his name is Iohn: for this is a plaine and euident proofe of his follie, or lacke of sufficient memorie [l].

4 When † the testator doth erre in the *qualitie* of the executor or legatarie, this error is not hurtfull [m], vnlesse that qualitie were the finall cause wherefore the testator made him executor or legatarie: for the error in such a qualitie dooth make voide the disposition [n]: for example; the testator saith, I make my cosin Iohn at Stile my executor, or I giue to my cosin Iohn at Stile an hundred pound: in this case, if Iohn at Stile be not cosin to the testator, he cannot obtaine the executorship, or legacie [o]. Hereunto it may be added, that if the testator do erroniously expresse a false cause, the disposition is void [p]: for example; the testator saith, because thou didst lend me an hundred pounde, I bequeath vnto thee an hundred pound [q]; or because my sonne is dead, thou shalt be my executor [r]: In which cases the cause being false, the disposition is of no force. And although it be written, that a

d) L. si. in nomine. C. de testa.
e) Iaſ. & Sichard. in d. L. ſi in nomine. Ripa. in L. ſi quis in fund. ff. de leg. 1. n. 9. quem vide.
f) Sicha. in d. L. ſi in nomine. n. 14. Ripa. in L. ſi quis fundi. ff. de leg. 1. vbi ſublimitat hanc limitac. quãdo viz. natus & educatus eſſet filius in loco remoto.
g) Ripa. in d. L. ſi q̃s. n. 8
h) Sichard. & alij in d. L. ſi in nomine.
i) Supra 2. part. §. 1.
k) Iaſ. in d. L. ſi in nomi.
l) Bar. in L. cum in liberis. C. de hæred. inſtit. & eſt communis opinio, vt per Graſſ. Theſaur. com. op. §. Inſtitutio. q. 29. n. 2.
m) L. falſa demonſtratio. ff. de cond. & demõ. c. 1. 29. q. 1. Mantic. de coniect. vlt. vol. lib. 4. tit. 5. n. 16. Paul. de Caſtro. in L. quoties. ff. de hæred. inſtit.
n) L. neque profeſſio. C. de teſta.
o) d. L. neque. & ibi DD. & Graſſ. Theſaur. cõ. op. §. Inſti. q. 29. n. 4. vbi refert hanc op. eſſe receptã ab omnib', niſi fortaſsè teſtator ſolet appellare illum cõſanguineum ſuum.
p) Bar. in L. demonſtratio. §. quod autem ff. de cond. & demon. n. 13.
q) Bar. vbi ſupra. verb. quædã cauſa proxima.
r) L. ſui ff. de hæred. inſtit. Sichard. in Rub. de hæred. inſtit. C. n. 3.

falſe demonſtration or falſe cauſe, dooth not hurt the diſpoſition[f]: yet that is to bee vnderſtoode, where the teſtator dooth not ignorantly, but wittingly[t] expreſſe the ſame.

But † when the teſtator dooth ignorantlie 5
expreſſe a cauſe, which is ſo annexed vnto the legacie[u], as without the which cauſe hee would not haue giuen that legacie[x]: in this caſe the cauſe being falſe the legacie is voide[y]

If the † error touch the *thing bequeathed*, then 6
we are to enquire whether the teſtator doo erre in the *name*, or in the *ſubſtance*, or in the *qualitie*, or in the *quantitie* of the thing bequeathed.

The † error of the teſtator in the *proper name* 7
of the thing bequeathed, doth not hurt the validitie of the legacie, ſo that the bodie or ſubſtance of the thing bequeathed bee certaine[z]: for example; the teſtator dooth bequeath his horſe *Bucephal*, whereas the name of his horſe is *Arundell*: this errour is not hurtfull, but that the legatarie may obtaine the horſe *Arundell*, if the teſtators meaning be certaine[a]: for names were deuiſed to diſcerne things[b]: If therefore wee haue the thinge, it skilleth not for the name[c].

The † errour in the *name appellatiue* of the 8
thing bequeathed, doth deſtroy the legacie[d]: for example; the teſtator intending to bequeath a horſe, doth bequeath an oxe, or meaning to bequeath gold, doth bequeath apparell: in both theſe caſes the legacie is voide[e]. The reaſon of the difference (I meane of the diuers effects betwixt the error in proper names, and the error in

s) L. cum tale. §. falſam. de cond. & demon. ff. §. longè. Inſtit. de lega.
t) Gloſſ. in L. 1. C. de falſa cauſa adiect. & ibi Doctores.
v) Bar. in d. L. demonſtratio. §. quod autem. de cond. & demon. ff. n. 13. & Paul. de Caſtr. in d. L. n. 5.
x) Secus ſi cauſa ſit impulſiua tantum, quę ab ignorante adijcitur, nã illa quantũcũque falſa, non viciat diſpoſitionẽ, niſi fortè non cauſatiuè, ſed conditionaliter ſit adiecta, quia tunc viciatur diſpoſitio, ſiue intellexerit, ſiue ignorauerit teſtator cauſam illam non exiſtere. Sichar. in d. Rub. Paul. de Caſtr. in d. L. demõſtratio. Minſing. & alij, in d. §. longè. Inſtit. de lega. Vigelij Method. iur. ciuil. lib. 12. c. 10. excep. 71.
y) Porcius in §. longè. Inſtit. de lega. & ibi Minſing n. 2. Sichard. in Rub de hæred. inſti. C. & Paul. in d. L. demonſtratio.
z) §. ſiquidem in nomine. Inſtit. de lega. quæ ſententia communis eſt. Graff. Theſaur. cõ. op. §. Legatum. q. 65.
a) Bar. Zaſ. & alij, in L. ſi quis in fũdi. ff. de leg. 1.
b) L. labeo. ff. de ſup. leg.
c) d. §. ſi quidem in nomine. Inſt. de lega.
d) Si quis in fundi. ff. de leg. 1.
e) d. L. ſi quis in fundi.

9 in names appellatiue) is becauſe † a proper name is an accident, attributed to ſome ſingular or indiuiduall thing, to diſtinguiſh the ſame frō other ſingular things of the ſame kinde: whereas names appellatiue doo reſpect the ſubſtance of things, and being common to euerie ſingular of the ſame kinde, make them to differ from
10 things of other kinde or ſubſtance [f]. Againſt † this reaſon it is commonly obiected, that words or names are but inuented to ſignifie thinges [g], and that the wordes of the teſtator are to bee drawen euen into an improper ſenſe, to maintaine the will and diſpoſition of the teſtator [h]. To the which obiection it is anſwered, that theſe woordes which haue a manifolde ſenſe, may be ſtretched to that ſenſe which is contained therein, albeit improperly: but to comprehend that ſenſe, which is not at all within compaſſe of the wordes, neither properly nor improperly, they may not be ſtretched ſo farre [i], for then this concluſion hath place: *That which I would, I ſpake not; that which I ſpake, I would not*; and ſo neither is good [k].

f) Minſing. in d. §. ſi quidem in nomine. n. 8 DD. in d. L. ſi quis. & in L. ſi in nomine. C. de teſtam.

g) Text. in d. §. ſi quidē in nomine.

h) L. non aliter. de leg. 3. ff. Mantic. de coniect. vlt. vol. lib. 3. tit. 5. n. 2.

i) Ripa. & Zaſ. in L. ſi quis in fundi. ff. de leg. 1. ille. n. 26. iſte. n. 20.

k) L. in ambiguo. de reb. dub. ff.

11 Neuertheleſſe †, it is not perpetually true, that the errour in the name appellatiue of the thing bequeathed, doth make voide the diſpoſition: for if the thing bequeathed be preſent, & the teſtator doth with his hand demonſtrate the ſame, albeit he doo erre in the name appellatiue, it dooth nothing hinder the validitie of the legacie [l]. Likewiſe if there bee ſome conformitie or ſimilitude betwixt the name appellatiue, and the name wherein the teſtator dooth

l) Gloſſ. in L. quæ extrinſecus. ff. de verb. ob. Iaſ. in d. L. ſi quis in fundi. qui ibi refert hāc opinionem eſſe veram.

erre, the legacie is not voide: as if the teſtator meaning to bequeath his bookes, dooth bequeath his papers[m]: or if the teſtator proteſt, that the legacie ſhall paſſe by thoſe tearmes; for then the error in the name appellatiue is not hurtfull[n]: or if by common vſe of ſpeech the name appellatiue be altered; for then it is in the electiõ of the teſtator, to vſe whether name he will, euen that which is leſſe proper[o]: or if the names be artificiall, not naturall, as to vſe *proctorſhip, for curatorſhip*[p].

The † error in the bodie or ſubſtance of the 12
thing bequeathed, dooth deſtroy the legacie[q], like as in the perſon of the executor or legatarie[r].

When † the error is in the *quantitie* of the 13
thing bequeathed, it doth not hurt the legacie[s]: For example; the teſtator meaning to bequeath the fourth part of his goodes, dooth by wordes bequeath the one halfe; or meaning to giue but fiftie pound, dooth bequeath an hundred pound: or contrariwiſe the teſtator meaning to bequeath a great quantitie or ſumme, dooth expreſſe a leſſer rate or ſumme[t]: In theſe caſes the legacie is good, and the legatarie may obtaine ſo much as the teſtator did meane, bee it more or leſſe then the portion or ſumme vttered[v].

Howbeit † if the quantitie be bequeathed 14
as a certaine bodie: as if the teſtator bequeath an hundred pound lying in ſuch a cheſt, when as there is no money in the cheſt, in this caſe the legacie is voide[x]. Likewiſe if the teſtator doo generally bequeath vnto another whatſoeuer he

m) Gloſſ. in d. L. ſi quis in fundi Bar. in L. quæſitum. §. ſi mihi. de leg. 1. & eſt com. op. ait Graſſ. Theſaur. com. op §. legatum. q. 65.

n) Gloſſ in d. L. ſi quis in fundi. & quod hæc communis ſit, numerat Ripa in d. L. ſi quis. n. 27. & Graſſ. §. legatũ. q. 65.

o) Iaſ. Zaſ. & Ripa. in d. L. ſi quis in fundi.

p) Minſing. in §. ſi quidem in nomine. Inſtit. de lega. n. 2.

q) Si quis in fundi. de leg. 1. ff.

r) L. quoties. de hæred. inſtit. ff.

s) L. qui quartam de leg. 1. ff.

t) Et ſic valet legatum, ſiuè quantitas ſit continua, ſiuè diſcreta: vel vt alij loquuntur, ſiuè pars ſit quotitatiua, ſiuè numeralis. Iaſ. & Zaſ in d. L. qui quartã.

v) Bald. Paul. de Caſtr. Alex. Iaſ. & Zaſ. in d. L. qui quartam. quamuis Bar. contrariam partẽ teneat, caſu quo minor ſumma ſit expreſſa, cuius opinio communiter reprobatur. Et ſic valet legatum vtroque caſu.

x) L. ſi ſeruus. §. ſi quinque. L. ſed & ſi certos nummos. ff. de leg. 1. Minſing. in §. huic proxima. Inſtit. de lega. n. 8. Graſſ. §. legatum. q. 59. n. 3.

he himſelfe doth owe vnto that other, the teſtator not being indebted; the legacie is voide[y]. So it is if the teſtator do ſay, I do bequeath vnto ſuch a man tenne pounde which hee oweth me; in this caſe alſo the legacie is voide, if the legatarie be not at all indebted to the teſtator[z]. So it is, if the teſtator doo bequeath a certaine ſumme to one, which either hee (the legatarie I meane) or ſome other doth owe vnto the teſtator, when no ſuch ſumme is due by either of them to the teſtator[a]: for whether the teſtator did knowe, or not know, that nothing was due vnto him: in both theſe caſes the legacie is voide[b]. So it is, if the teſtator ſuppoſing himſelfe to be indebted to another, dooth bequeath that debt to the perſon to whom he erroniouſly ſuppoſeth himſelfe to be indebted, not expreſſing any quantitie, for the legacie is in this caſe voide, as is aforeſaid[c]. But if the teſtator knowing himſelfe not to be indebted, doth ſay, I bequeath to ſuch a perſon ten pound which I do owe vnto him, in this caſe the legacie is good, notwithſtanding the falſe demonſtration[d]: neither is the teſtator preſumed to erre in this caſe, and therefore vnleſſe the executor make proofe of the error, the legatarie may recouer the legacie[e].

y) L. ſi ſic. §. ſi mihi. ff. de leg. 1.

z) Minſing. in d. §. huic proxima. Inſtit. de lega.

a) L. ſi ſic. §. ſi mihi. & laſ. in d. §.

b) Paul. de Caſtr. in d. § ſi mihi. & Minſing. in d. §. huic proxima.

c) d. §. ſi mihi.

d) Eod. §. ſi mihi. & Minſing. in § huic proxima. Inſtit. de lega. n. 6.

e) Caſtrenſ. in L. 2. C. de falſa cauſa adiect.

15 Where † I ſaid a little before, that the legacie of quantitie being bequeathed *as a certaine bodie*, as when the teſtator dooth bequeath an hundred pound lying in ſuch a cheſt, or which ſuch a perſon doth owe vnto him, that then no mony being foūd in the cheſt, or nothing being

due by that person, the legacie is voide[f]. This conclusion dooth admit these limitations: one is when the misreport or false demonstration is not ioined to the substance of the legacie, (as before[g]) but to the execution thereof: as thus, viz. I giue to A.B. an hundred pound, and I will that the same be paide of the money which I haue in such a chest, or of the mony which such a man doth owe vnto me. For albeit there bee not any mony in that chest, nor any due by that person named by that testator, neuertheless the whole legacie is due, and is to bee paide of the testators goodes[h]: for the legacie being once pure and simple, and perfect in it selfe, it is not made conditionall by that which followeth, in another sentence respecting the performance, and not the substance of the legacie, for by such demonstration the testator is presumed to haue had a care onely howe the legacie might bee paide, the more easily, or with lesse discommoditie to the executor, not whether it should bee paide at all vnto the legatarie[i].

Another limitation is this, when some part of the legacie consisting in quantitie is extant, though not al, according to the demonstration of the testator[k]: For example, the testator doth bequeath ten pound remaining in such a chest, at whose death fiue pounde onely is founde in that chest: In this case howsoeuer this legacie be, as of a certaine bodie, yet fiue pound is due and recouerable by the legatarie[l], but no more then fiue pound: Insomuch that if at the death of the testator there were ten pounde found in that

f) L. si seruus. §. si quinque. L. sed & si certos nummos. ff. de leg. 1.

g) Hoc ipso §. & plenè supr. part. 4. §. 17. n. 8. &c

h) L. quidam testamento. ff. de leg. 1.

i) d. L. quidam. & L. paulo. de leg. 3. Bar. Castrens. & alij in d. L. quidam.

k) L. si seruus. § si quinque. ff. de leg. 1.

l) d. §. si quinque.

that cheſt, whereas at the time of the making of the teſtament there was no more but fiue poũd in the cheſt: In this caſe fiue pounde onely is due[m], vnleſſe the teſtator at the will making did thinke that there had beene ten pounde in the cheſt, and ſo did adde other fiue pounde thereunto, to make the ſumme anſwerable to his opinion, for then the legatarie may recouer the whole ten pounde, as if the ſame had beene all there, as well at the making of the teſtament, as at the teſtators death[n].

m) Paul. de Caſtr. in d. §. quinque. n. 9.

n) Idem Caſtrenſ. in d. §. quinque. n 9.

And here note, that the teſtator is preſumed to haue thought that there had bene ten pound in the cheſt, like as it is ſet downe in his teſtament, vnleſſe the executor doo proue the contrarie, viz. that the teſtator did know that there was but fiue pound in the cheſt when he made his teſtament[o].

o) Idem Caſtr. in d. §.

16 Error † in the *qualitie* of the thing bequeathed, doth not hurt the legacie, when the bodie or ſubſtance is certaine[p], no more then the error in the proper name: and therefore if the teſtator bequeath his white horſe, hauing but a blacke horſe, the legacie is good[q].

p) Angel. in d. L. ſi quis in fundi. ff. de leg 1.

q) Et eſt com. op. Ripa. in d. L. ſi quis in fundi. Graſſ. §. legatum q. 56.

17 Error † in the *forme of the diſpoſition*, maketh the ſame to be of no force[r]: For example; the teſtator intending to make an executor, or to bequeath any legacie conditionally, and not otherwiſe, doth by error omit the condition: In this caſe the diſpoſition concerning the executorſhip or legacie is voide[s]. Howbeit if the teſtator doo appoint an executor, or bequeath anie legacie, according to certaine conditions after-

r) L. quoties hæres. § tantundem. ff. de hære. inſtit.

s) d. §. tantundē. & DD. ibidem.

wards to be written, no conditions being afterwards written, the disposition is good, and as it were simplie made[t]; vnlesse it doo appeare that the testator did meane, that the disposition should not take place without those conditions following[v], as in the former example[x].

t)L.pen.C. de Instit. & sub.
v)Molin.in apostil. ad Dec.in d.L.pen.
x)d §.tantundem.

Of vncertaintie.

1 *Diuerse are the meanes whereby vncertaintie doth growe.*

§.vi.

THat we may the better vnderstand when the vncertaintie is such, as it dooth ouerthrow the disposition, (for sometimes it doth destroy the same, and sometimes not) wee are to be aduertised †, that the vncertaintie dooth 1
somtimes respect the *person of the executor or legatarie*[a]: somtimes it doth respect *the thing* bequeathed[b]: and sometimes it doth respect *the time or date of the testament*[c].

a)Infra §.7.§.8.
b)Infra §.10.
c)Infra §.11.

The testament is vncertaine in respect of the person of the executor or legatarie by diuerse meanes, especially by these meanes following.

First, when it cannot bee vnderstoode by whome the testator meaneth, either for that there is *no person certainly named*, or else some being named, yet *no person of that name to bee founde*[d].

d)Infra §.prox.

Secondly, when there *bee diuerse persons of one*

one and the same name, whereby the testator maketh his executor, or dooth bequeath anie legacie[e].

e)Infra §.8.

Thirdly, when the testator dooth appoint executors or giue legacies *alternatiuely, or disiunctiuely,* as I make A. or B. my executor[f].

f)Infra §.9.

Of the other vncertainties; viz. in respect of the thing bequeathed, or date of the testament, it followeth afterwards[g]. In the meane time therefore of the vncertaintie concerninge the person of the executor or legatarie.

g)Infra §.10.§.11.

Of vncertaintie, either because no certaine person is named, or some being named, none of that name to be founde.

1 *The vncertaintie of the person maketh voide the disposition.*
2 *If the person at the first vncertaine, be afterwardes made certaine, whether is the disposition good or no.*
3 *What if some person be named, but no person found of that name.*

§.vij.

1 WHere† no certaine person is named executor or legatarie, the will in that point is voide[a]: and therefore if the testator say, I make one man of the world my executor, or I giue to one of the world an hundred pound, no man can be exe-

a)Bar. in L. quidam. ff. de reb. dub. Clar. §. testim. q. 36. Graff. Thes. com. op. §. legatū. q. 64.

cutor, nor recouer the hundred pound by this diſpoſition[b], vnles he be able to proue, that the teſtators meaning was that he ſhould be executor, or haue the legacy[c]. Likewiſe wher the teſtator ſaith, I make that perſon my executor, or giue him an C.li. whoſe name is written in a ſchedul in the cuſtodie of ſuch a man, when as in deede there is no ſuch ſchedule to be found, or being found, yet no name therein: this diſpoſition is voide[d]: neither is it ſufficient that a paper or ſchedule be extant, and that the name be therein plainly conteined, vnleſſe alſo it appeare by ſufficient proofe or lawfull coniectures, that this ſchedule is the verie ſame, whereunto the teſtator made relation[e].

If no certaine perſon bee named at the firſt, but afterwards made certaine by euent, the teſtament or diſpoſition is of no leſſe force then if the perſon had beene eſpecially and certainly named at the firſt[f]: For example; the teſtator maketh that man executor, or giueth him an hundred pound, which ſhall marie the teſtators daughter: In this caſe whoſoeuer ſhall marrie the teſtators daughter, he is to be admitted to the executorſhip, and may obtaine the legacie, as if he had beene named at the firſt[g]. And this concluſion proceedeth whether the marriage be made in the life time of the teſtator, or afterwards[h]: ſauing where the mariage is made after the death of the teſtator, if it be likely that the

b) Ætiologia eſt, quia iſta perſona eſt incerta ex incertis. Bar. Graſſ. & Clar. vbi ſupra. Are. in §. ex incertis. Inſtit. de lega. & Mantic. de coniect. vlt. vol. lib. 8. tit. 4.

c) Minſing. in d. § ex incertis. Saltem valet legatū iure can. Felin. in c. 1. de pact. extra.

d) Bar. in L. ſi ita ff. de cond. & demon. Couar in c. cum tibi de teſtā. extra. Simo de Præris. de interp. vlt. vol. lib. 3. ſoluc. 1. n. 12.

e) Bar. in d. L. ſi ita. Couar. in d. c. cum tibi. Graſſ. Theſaur. com. op. §. Inſtit. q. 16. Mant. de coniect. vlt. vol. lib 1. tit. 7. n. 7. Clar. § teſtū. q. 36. in fin.

f) L. quidam. & ibi. Bar. de reb. dub. ff. Angel. Are. in d. §. incertis. Inſt. de legat.

g) d. L. quidam, de reb. dub. ff. Nec obſtat quòd tutor non poteſt dari is qui venit aliquo euētu certificandus, quia cōtrarium procedit iure cano. Apoſt. ad Bar. in L. duo. ff. de teſta. tute. Adde quod licèt executor nonnunquam aſſimuletur tutori, vt p. Bar. in d. L. quidam. & per DD. in L. ſi quis à filio. §. ſi quis pluries. de leg. 1.

h) Tamen in Anglia aptiùs comparatur hæredi, qui incertus ex incertis euentu certificandus poteſt inſtitui. Are. in d. §. ex incertis. Inſtit. de lega. (h) L. vter. cum ſequent. ff. de cond. Inſtit. Donellus in L. quidam. de reb. dub. Bald. conſil. 138. vol. 5.

haue

testator would not haue made that person executor, or haue giuen him the legacie, if he had thought that it would so fall out, that he should haue married his daughter, (for that perhaps that person was enimie to the testator, or otherwise vnworthie of any benefite by the testator:) In this case the person marrying the testators daughter after his death, cannot be executor, or recouer the legacie[i].

3 If† a certaine person be named, but no such person be to be found, and the meaning of the testator vtterly vnknowen; it is as if the testator had made no mention of any[k].

i) Donel. in d. L. quidãde reb. dub. Simo. de Prætis. lib. vlt. de Interp. vl. vol. fol. 128. n. 9.

k) L. 2. ff. de his quæ pro non script.

Of vncertaintie arising becausе there be diuerse persons of one name.

1 *Where diuerse persons be of one name, the disposition is voide.*
2 *What if the testators meaning be knowen.*
3 *What if the one of them be a familiar friend, the other not.*
4 *What if the one be of kin to the testator, the other not*
5 *The disposition* ad pias causas, *is not voide by reason of vncertaintie.*
6 *What if the testator giue somewhat to the Church, what Church is vnderstood.*
7 *What if there be diuerse churches of one name.*
8 *If the testator giue any thing to the poore: which poore are to haue the same.*
9 *The authoritie of the executor testamentarie, in distributing to the poore.*

10 *What*

10 *What if the executor make his kin his executor, who is to be admitted.*

11 *What if the testator make an others kinne his executor.*

§. viii.

WHere † the testator nameth some one man his executor, or doth bequeath some legacie vnto him, and there be diuerse men of that name; this vncertaintie maketh voide the disposition [a]: For example; the testator maketh Titius his executor; whereas there be diuerse persons so called: or to speake after the maner of our temporall lawyers, the testator maketh Iohn at Stile his executor, or giueth to him an hundred pound, and there be two persons called Iohn at Stile, and the testator maketh no difference, but leaueth it vncertaine of whome he did meane: In this case neither of them can obtaine the executorship or legacie [b]. 1

a) L. si quis. §. si inter. ff. de leg. 2. Bald. in L. hac consultissima. C. Qui testa. fac. poss. n. 4.

b) DD. in d. §. si inter.

But † if the one of them doo prooue that the testator did meane, that he should be executor or haue the legacie, it is sufficient for the obteining of the executorship or legacie [c]. 2

c) Bar. in L. quidam. ff. de reb. dub. Simo. de Prætis. de interp. vl. vo. lib. 1. fol. 97. n. 1.

Or if † one of them appointed be one of the testators familiar acquaintance, and his friend, the other a straunger: In this case the straunger is excluded, and the other admitted [d]: or both of them being friends; yet if one of them bee ioined in greater friendship with the testator then the other, he is to be preferred to the executorship 3

d) L. quem hæred. ff. de cond. & demon. Mantic. de coniect. vlt. vol. lib. 8. tit. 4. n. 5.

ship or legacie befor the other [c].

4 Or if the one of them † be of kin to the testator, and the other not of kin, the kinsman is to be preferred [f]: and if they bee both cosins, then I suppose that whether of them were to be admitted to the administratorship, in case the testator had died intestate, that he is to bee admitted to the executorship [g].

5 Or if † the disposition be made *ad pias causas*, it is not voide, by reason that the name is common or agreeable to diuerse. And there-
6 fore † if the testator doth bequeath any thing to the Church, not expressing what Church hee dooth meane, the disposition is not voide, but is to be vnderstood of his parish Church [h]. And
7 if the testator † name a Church, and there be diuerse Churches of that name, it is to bee vnderstoode of his parishe Church [i]: For example; the testator dooth bequeath to Saint Peters Church in Oxford an hundred pound, where there be two churches of that name; this disposition is not voide: But the bequest is due to the testators parish Church, or where he did more vsually resorte to pray vnto God, or to heare his worde [k]. And if neither of them bee his parish Church, neither can it appeare that the testator did more frequent the one then the other: or on the contrarie, if both of them were his parish Churches, for that perhaps he kept a family in either parish, and did equally frequent either Church: In these cases, by the opinion of some writers, the legacie is to be diuided betwixt the Churches [l]. But by the opinion of the more

c) Simo. de Prætis. de Interp. vlt. vol. lib. 1. fol. 100. n. 3. Mantic. de coniect. vlt. vol. lib. 8 tit. 4. n. 5.

f) L. cohæredi. §. qui discretas. ff. de vulg. sub. Mantic. de coniect. vlt. vol. lib. 8. tit. 4. n. 5.

g) Ias. in L. 1. §. hoc autem. ad Trebel. lect. 3. ff. Simo de Prætis. de Interp. vlt. vol. lib. 1. fol. 98. n 9. Mantic. de coniect. vlt. vol. lib. 4. tit. 6. n. 3. 4.

h) Gloss. in L. quidam. ff. de reb. dub. Abb. in c. iudicante. de testa. extr. Bar. & Ias. in L. 1. de sacrosan. eccle. C. Grass. Thesaur. com. op. §. Institutio. q. 12. & §. Legatum. q. 64. Manti. de coniect. vlt. vol. lib. 8. tit. 6.

i) Bar. in L. conditione. §. cum ita. ff. de cond. & demon. Panor. in c. iudicante de testa. extra.

k) Et hæc est com. op. ait Ias. in L. qui insulã. ff. de verb. ob. Grass. Thesaur. com. op. §. legatum. q. 64. Couar. in d. c. iudicante de testa. extra.

l) Barba. in d. c. iudicã. te. & ibi Couar. asserens hanc opinionem esse veriorem.

more part, it is in the power of the executor, or if the executor do refuse to proue the will, or that there be no executor appointed by the testator, thē it is in the power of the ordinarie, to bestow the same legacie on whether church he thinketh good[m], as the cōsideration of diuers circumstances shall induce him: wherein (amongest other things to be remembred by the Ordinarie) this is not to be forgotten, viz. whether parish is the poorer[n].

In like maner if the testator † make the poore 8
his executors, giuing them the residue of his goods: this disposition is not voide by reason of vncertaintie, for that it is a testament *ad pias causas*[o]. By the poore therefore in this place, is vnderstoode the poore of the parish where the testator did dwell and keepe house[p]: for it is likely that he did beare a great affection to the poore where he dwelled[q], especially also if the testator were buried in the same place[r]: and therefore the Ordinarie in this case ought to prouide, that the poore haue their due, according to the meaning of the testator[s]. But if the † 9
testator doo bequeath a certaine summe to be distributed amongst the poore, and doo appoint an executor, then it is the office of that executor to distribute the same[t], who in the distribution thereof is not necessarily tied to bestowe it wholy vpon the poore of that citie, parish, or place where the testator did dwell[v] (vnles the testator did meane that the same should be bestowed on them alone[x]:) neither is he precisely tied to make choise of the poorest persons[y],

m) Hostiens. & alij in d.c. iudicante, quorum op. esse com. fatetur Couar. in d. c. iudicante. Idem quoque dicit Graff. Thesaur. com. op. §. legatum. q. 64. Benedict. Capra. Tract. regul. & fall. reg. 113.

n) Gloss. in d.c. iudicante. Mantic. de coniect. vlt. vol. lib. 8. tit. 5. n. 4.

o) Tiraquel. Tract. de priuileg. piæ causæ. priuileg. 56.

p) L quis ad Declind. §. vbi. C. de episcopis & cler. gloss. in c. si pater. verb. pauperes. de testa. lib. 6. Couar. in c. cum tibi de testa. extr. Mantic. de coniect. vlt. vol. lib. 8. tit. 5. n. 2.

q) Mantic. d. tit. 5. n. 2.

r) Panor. consil. 99. lib. 2. n. 4.

s) L. nulli, C. de episcopis & cler. d. c. iudicante. de testa. extra. & gloss. ibidem.

t) Mantic. de coniect. vlt. vol. lib. 8. tit. 5. n. 2.

v) Gem. & Franc. in c. si pater de testa. lib. 6.

x) Mantic. d. tit. 5. n. 2

ſons[y]; but may vſe a further libertie, ſo that he do not abuſe the ſame[z]: for he may not ſo make choiſe of any perſon, as it may ſeeme too oppugne the teſtators liking and meäing[a]: neither may he beſtow the whole legacie vpon one perſon alone[b], nor vpon himſelfe, nor his children vnleſſe they be verie poore[c], nor vpon ſuch perſons as will vnthriftily ſpend it; but vpon ſuch poore to whom it may do good, and eſpecially if the kinsfolkes of the teſtator be poore, and of the ſame pariſh where the teſtator did dwell, they are to be preferred[d].

10 Hereunto it may be added, that if the † teſtator make his kinne his executor, or giue his goodes to his kinne, that this diſpoſition is not voide, but that they which bee in the next degree of kinred to the teſtator, to whom the adminiſtration of his goodes were to be committed, if he had died inteſtate, are to be firſt admitted to the executorſhip[e], or to enioy the legacie during their liues[f], and after their deathes, the other next of kin to the teſtator are to be admitted one after another, ſucceſſiuely by degrees, and not altogether[g]; ſauing where the teſtator doth make anothers kinred his executor, or doth bequeath ſome legacie to any others kin: for then they are all to bee admitted together, without reſpect or degree, neerer or further of[h]: The reaſon of the difference is, becauſe the teſtator is not preſumed to carie an equall affec-

y) Bar. in L. vnum ex familia. §. 1. ff. de leg. 2. Bald. in rep. L. 1. de ſacroſan. eccle. C. Mantic. d. tit. 5. n. 6.

z) Pariſ. conſil. 45. vol. 3. & Mantic. d. tit. 5. n. 8.

a) Angel. in L. ſed & ſi. §. ſi libertis. ff. de iud. Pariſ. conſil. 26. vol. 4. n. 29.

b) Bar. in L. 1. ff. de op. leg. Bald. in rep. L. 1. C. de ſacroſa. eccle. Mantic. de coniect. vlt. vol. lib. 8. tit. 5. n. 18. 19.

c) Brook. tit. exec. n. 116 c. tua nos de teſta. extr. Imol. in Clem. 1. de teſta. Mantic. d. tit. n. 9.

d. Bald. in L illa Inſtitutio. ff. de hæred. inſtit. Pariſ. conſil. 26. vol. 4. Mantic. de coniect. vlt. vol. tit. 5. n. 17.

e) Iaſ. in L. Gallus. §. quidam rectè. ff. de lib. & poſthu. Tiraquel. de retract. ligniager. §. 11. gloſſ. 12. Graſſ. Theſaur. com. op. §. Inſtitutio. q. 20. n. 12.

f) Bar. in L. cum ita. §. fin. ff. de leg. 2. Pariſ. c6. ſil. 49. vol. 2. Graſſ. Theſaur. com. op. §. legatū. q. 41. & §. fideicommiſſum. q. 16.

g) Paul. de Caſtro. in d. L. cum ita. §. fideicommiſſo. Cuius op. cō. eſt

vt refert Pariſ. conſil. 11. n. 28. vol. 3. Couar. in c. Ranutius. §. 2. de teſta. extra. Graſſ. Theſaur. com. op. §. fideicommiſſum. q 16. (h) Bar. in L ſi cognatis. ff. de reb. dub. Simo. de, Præpis. de interp. vlt. vol. lib. 3. fol. 91. n. 28. Graſſ. Theſaur. com. op. §. Inſtitutio. q. 20. n. 10.

tion

tion towardes euerie of his owne kinne, but to him that is neerer of kinne greater loue, and to him that is further off, lesser: And therefore of his owne kinred the best beloued is first preferred, which inequalitie of good will, is not presumed towardes anothers kinred, and therefore they are admitted without difference[i].

i) Bar. & Simo. de Præris. vbi supra.

Vncertaintie arising by reason of alternatiue or disiunctiue speech.

1 *The executor saying, I make A. or B. executor, it is as if he had saide, I make A. and B. executor.*
2 *What if the testator be more affected to the one then to the other.*
3 *What if the election be referred.*
4 *What if the one be capable, the other not.*

§. ix.

THe alternatiue † or disiunctiue speech of the testator in making executors or disposing of any legacie, doth not hurt the testament[a]: And therefore if the testator say, I make A. or B. my executors, or I bequeath to such or such a person an hundred pound: this disposition is not voide, but both of them shall be admitted executor, and both of them obteine the legacie, to be diuided betwixt them[b]. 1

a) L. cum quidam. C. de verb. signif.

b) d. L. cum quidam. & DD. ibidem.

And albeit, at the first there was great dissension

ſenſion and conflictes in opinions about this queſtion; at laſt it was eſtabliſhed for lawe that this worde (*or*) in fauour of teſtamens ſhould be taken for (*and*[c]) when it is ſo placed betwixt two perſons, as it may ſeeme to miniſter doubt to the hearer, of whether perſon the teſtator did meane[d]: And therefore the teſtator ſaying, I make A. or B. my executor, it is in effect, as if hee had ſaide, I make A. and B. executors[e], &c. which concluſion notwithſtanding is ſometimes limited, and one onely of the perſons is to bee admitted.

c) Text. in d. L. cum quidam.

d) §. melius. in d. L. cum quidam.

e) d. §. melius.

2 The firſt limitation is, when † the teſtator dooth beare more affection to the one then to the other; for then he to whom the teſtator beareth more affection, is to bee preferred before the other[f]: For example; the teſtator ſaith, I make my brother, or his children my executors, or I bequeath to my brother, or his children ſuch a thing: In this caſe, foraſmuch as the teſtator is preſumed to carrie a greater loue to his brother then to his brothers children, hee ſhall firſt be admitted to the executorſhip, and obtaine the legacie, and enioy the ſame during his life, and after his deceaſe, his children then ſhall be admitted[g]. But this vnequall order of affection hath not ſuch vnequall effect, when the teſtator doth make his brother and his children executors, by this worde *and*, or *with*, as before hath beene declared, for then they bee all admitted equally and not ſucceſſiuely[h].

f) Ripa. in c. inter cæteras. de reſcrip. extra n. 54. Pariſ. conſil. 21. vol. 3. Iul. Clar. §. teſtam. q. 80. n. 5.

g) L. cum pater. §. à te. ff. de leg. 2. Bald. in c. 1. de eo qui ſibi & hæred. ſuis. lib. feud. Iul. Clar. d. q. 80. n. 5.

h) Iaſ. in L. Gallus. §. quidam rectè. ff. de lib. & poſthu. Clar. §. teſtam. q. 80. n. 6. quæ opinio ab omnibus iuris interp. eſt recepta, ait Clar. eod. n. 6.

3 An other limitation is, when † authoritie

is granted to another of making election : For example; the testator maketh his executors A. or B. whome the Ordinarie shall chuse, or giueth an hundred pound to A. or B. whome the executor shall chuse. In this case, this disiunctiue *or*, standeth properly, and is not changed into a coniunctiue: and so election being made of the one, the other is excluded[i].

i) L. Si Titio. aut Seio. de leg. 2. L. vtrum. §. cũ quidam. de reb. dub. ff.

An other limitation is, when † the one of the persons is not capable of the executorship or legacie: for then also the disiunctiue standeth properlie, and the other person alone shall obtaine the executorship or legacie[k]. 4

k) Ias. in L. cum quidã. C. de verb. signif. limi. 5. quippe qui alias habet in eo loco istius regulæ limitationes.

Of vncertaintie respecting the thing bequeathed.

1 *Whether vncertaintie by reason of generalitie in the thing bequeathed, dooth make void the disposition.*
2 *Whether the disposition bee voide when that is bequeathed which of the Logitiãs is called* Species.
3 *Whether the legacie of wine or corne, no quantitie being expressed be voide.*
4 *By the equitie of the ecclesiasticall lawes, vncertaine testaments are saued from destruction.*
5 *Who ought to choose where a legacie is giuen generally, the executor or the legatarie.*
6 *The maner of election.*
7 *Of legataries who must choose first.*
8 *Of collegataries dissenting amongest themselues, what meanes is to be vsed.*

§. x.

§. X.

THat the diſpoſition or bequeſt is ſometimes ouerthrowne or deſtitute of effect, by reaſon of the vncertaintie of the thing bequeathed, may appeare by that which hath beene alreadie ſpoken of error in the thing bequeathed[a]: For by what meanes the teſtator dooth erre, by the ſame meanes is his diſpoſition made vncertaine: concerning which kind of vncertaintie, whether it deſtroy the legacie or no, dooth there appeare. Now therefore of ſome other kinde of vncertaintie reſpecting the thing bequeathed, and namely whether the vncertaintie growing by occaſion of generalitie, make voide the bequeſt, or not.

a) Supra. eod. part. §. 9.

1 Firſt, when any thing is bequeathed vnder ſuch generall wordes, that the meaning of the teſtator is vnknowne, the diſpoſition remaineth without effect: as when the teſtator ſaith, *I do bequeath ſomething*, or I bequeath *a ſubſtance*, or I bequeath *a bodie*, or *a liuing creature*[b], for that which the Logitians call *genus* either *generaliſſimum*, or *ſubalternum*, being bequeathed, the executor is ſaid to bee deliuered, if he giue but a peece of bread, or a flie[c].

b) Gloſſ. & DD. in L. legato. generaliter. & L. ſi domus. ff. de leg 1.

c) Accurſ. Bar. & communiter DD. in d. L. legato. quamuis Zaſius in d. L. & Io. Rub. lib. 2. ſententiarum. c. 14. dicunt inutile quidē eſſe legatum, non tamen quia hęres dando quid minimum liberetur, ſed quia effuſum adeo & incertum eſt legatū, vt inutilem. potius quā vtilem actum, concipere voluiſſe, teſtator intelligatur.

2 If the † teſtator bequeath ſuch a thing, which in Logicke is called *ſpecies*[d], & in law *genus*, then we are to cōſider, whether the ſame thing do receiue his limits *of nature*, as a horſe, a tree, &c. or *of a man*, as a ſhippe, a gold chaine, or of *weight*,

d) Quod enim dialecticis eſt ſpecies Iuriſtæ genus appellant, quēadmodum & ſpecies dicitur à iuriſconſultis, id quod Dialectici appellant indiuiduum. Minſing. in §. ſi generaliter. Inſtit. de legat.

number, or *measure*, as lead, money wheat[e], &c.

In the first case, viz. if the testator bequeath a *horse*, the bequest is good, whether the testator haue any or none[f].

In the second case, viz. if the testator bequeath a *shippe*, or *a golde chaine*, by the common opinion of writers, the legacie is voide[g], vnlesse the testator haue a shippe, or a chaine. But others are of opinion that the legacie is good, although the testator haue no ship, or chaine[h]: and this opinion seemeth more reasonable, & more agreeable to the equitie of the ecclesiasticall lawes[i], especiallie if the testator knew that he had no ship, or chaine of his owne, when he made his will.

In the third case, viz. if the testator doo bequeath *lead*, or *money*, or *wheate*, not expressing the quantitie, the bequest is vnprofitable, because of the great vncertaintie: at least it seemeth the executor is deliuered, by deliuering a verie little[k]. Howbeit if the legacie consisting in weight, number, or measure, be disposed for the performance of some acte, or other certaine consideration, as for the building of some bridge, or amending of high waies, or for the education or alimentation of some person, or maintaining him at studie, or for the reliefe of the poore, or for the repairing of the Church, or for other like vses: In these cases the legacie is not voide, albeit no quantitie be expressed: for so much is vnderstoode to be disposed, as may satisfie or answere that purpose, whereunto it is appointed; and as the ordinarie considering the

e) Zas. lib. 1. Sing. respons. in princ. n. 33. Minsing. in d. §. si generaliter.

f) Bar. Paul. de Castro. & omnes Doctores in d. L. legato.

g) Angel. & Alex. in L. si domus. ff. de leg. 1. Ias. in eand. L. n. 16. ampl. 2. & 3. Bar. & Lanc. Dec. in L. quod in rerum. §. & si Nauem eod.

h) Zas. Sing. intel. lib. 1. c. 1. n. 42. 43. & c. Peckius de testa. coniug. lib. 5. c. 26. Minsing. in §. sed si generaliter. Instit. de lega. n. 9. 10. Claud. cautiuncula, & alij, de quibus Peckius in d. c. 26, qui hanc sententiam vt veriorem defendunt in re magis dubia, nempe in domo simpliciter legata. Graff. §. legatū. q. 61. n. 4. in fin.

i) Zas. in L. Triticum. & in L. ita stipulatus. de verb. ob. ff.

k) L. nummis. ff. de leg. 3. Gloss. in d. L. legato.

the neceſſitie of the thing, and the abilitie of the teſtator, and the continuance of the gift, ſhall deeme conuenient[l].

l) Zaſ. in L. ita ſtipulatus. de verb. ob. ff. n. 14. 15. & Ripa. in eand. L. n. 19. 20. 21. &c.

3 Moreouer, *by the † equitie of the lawes eccleſiaſticall*, not onely the legacie generall of things conſiſting in weight, number, or meaſure, as of wine, of oile, of corne, of iron, of braſſe, mony, &c. is good and auailable, without any quantitie expreſſed by the teſtator, which quantitie is vnderſtood to be left to the diſcretion of the ordinarie, to be limited by him as due circumſtances ſhall induce him[m]: but alſo *by the ſame † equitie*, it ſeemeth that the general legacie euen of that which the Logitiãs cal *genus* (which may be verified of things different in kind) is not void[n]; but it is to be certified and declared by the Ordinarie according to the eſtate of perſons, the common cauſe, and whatſoeuer may be collected by other circumſtances[o]: much leſſe is the legacie void, where the teſtator doth bequeath a certaine quantitie of corne, or wine, or other things conſiſting in number, weight, or meaſure, not expreſſing the kind of corn, viz. wheat, rie, or barlie; or of wine, viz. white, ſecke, or claret[p].

4

m) Archid. in c. ſunt nonnulli. 1. q. 1. Abb. in c. 1. de dec. extr. gloſſ. & DD. in c. nos quidé. de teſta. extra.

n) Veluti ſi animal legatum fuerit Zaſ. in L. Triticum. ff. de verb. ob. n. 11. Archid. in c. ſunt nonnulli. 1. q. 1.

o) Zaſ. vbi ſupra. & in L. ſi ita ſtipulatus. ff. de verb. ob. & ibi Alex. & Ripa.

p) Zaſ. & Ripa. in d. L. ſi ita ſtipulatus.

5 Here it may bee demaunded, *who † ſhall chooſe*, where the legacie is generall, the executor or legatarie? To this queſtion thus: If the teſtator doo expreſly graunt the election, the doubt is eaſily anſwered: he to whom the election is granted[q].

q) Graſſ. Theſaur. com. op. §. legatum. q. 62. in prin. Lanc. Dec. & Iaſ. in l. legato. ff. de leg. 1.

If there be no expreſſe graunt made by the teſtator, then if the woordes of the diſpoſition

be *directed to the legatarie* : as if the testator shall say, I will that A.B. shall haue a horse, the election dooth belong to the legatarie[r] : but if the wordes of the disposition be *directed to the executor* : as if the testator say, I will that my executor giue to A.B a horse, then the election doth appertaine to the executor[s]. If the wordes be *neither directed to the executor, nor to the legatarie*, it is answered, that if the thing bequeathed haue his limites assigned *of nature*, then the election is in the legatarie, in case such things be extant amongst the testators goods: and in case there be no such extant, the election is in the executor[t]. But if so be that the thing bequeathed be limited *by man*, the election dooth apperteine to the executor[v]: and so it is of things consisting in number, weight, or measure[x], albeit there be of those things extant amongest the goodes of the deceased[y], much more if there be none extant[z].

Prouided † alwayes, that of those things whch be extant the legatarie hauing the benefite of election, must not choose the very best[a], vnlesse there be no more but two of the things extant (for then he may choose the better[b]) or vnlesse the testator do graunt election, for then he may choose the best[c]. And likewise on the contrarie part, where the election belongeth to the executor, he may not obtrude to the legatarie, the very worst of those things which be ex- 6

r) Gloss. in L. lucio. ff. de leg. 2. & hæc opinio communis est, teste Grasso, d. §. legatum. q. 62. n. 2.

s) Couar. in c. iudicante. de testa. extr. n. 3. Zas. & alij in d. L. legato quorum opinio communis est, vt per Gras. vbi supra.

t) Gloss. Alex. Ias. Zas. in d. L. legato generaliter. & horum sententia communis est, ait Grass. d. q. 62. n. 3.

v) Ias. in d. L. legato. n. 20. Grass. d. q. 62 n. 3. verb. aut verò. contrarium Minsing. in d. §. si generaliter. n. 9. sed prior opinio est communis, vt per eund. Grass.

x) L. 3. & 4. ff. de Tritic. vin. & oleo leg. Zas. in d. L. legato. n. 18.

y) Atque hæc opinio communiter approbatur, siuè testator de certo senserit, siue nō, vt per Grass. vbi supra. qui tamen distinguit.

z) Minsing. in d. §. si generaliter. n. 7. Zas. in d. L. legato in fin.

a) Gloss. in L. si quis à filio. §. si quis plures. ff. de leg. 1 Zas. in d. L. legato generaliter. n. 13. 14. Minsing. in d. §. si generaliter. n. 6.

b) L. si seruus. §. cum homo. ff. de leg. 1. Zas. in d. L. legato. n. 14. (c) L. 2. ff. de option. leg. & Wesenb in eund. tit. n. 1. per L. in testamentis. de reg. iur. ff. è regione stat Zasius scribens, quòd etiamsi legatario detur optio, non tamen optima, sed mediocria sunt eligenda. in d. L. legato. n. 13.

tant

tant in the patrimonie [d]: and whereas there be not any ſuch thinges amongeſt the teſtators goods, the executor muſt prouide ſome competent thing[e].

Furthermore, it is to be remembred, that if the teſtator hauing two things, wherof the one is much better then the other (be it for example two horſes) do bequeath to two perſons either of them a horſe, he that is firſt named in the teſtament may firſt chooſe [f].

8 Finally, this is not to be omitted, that if the legataries diſſent aboute the election of the thing bequeathed, this controuerſie is to be decided by lot, if it be not otherwiſe reſolued who in that choiſe is to be preferred[g].

d) DD. in d. L. legato. Couar. in c. iudicante de teſta. extra. n. 3. & hoc indubitatum in ſpecieb⁹. Sed in quãtitatibus & in ſummis, quod minimum eſt deberi intelligitur, ſi Caſtrenſi credamus in d. L. legato. n. 4. Verum in huiuſmodi legatis ſeruandum eſt boni viri arbitrium. Archid. in c. nonnulli ſunt. 1. q. 1. Abb. in c. 1. de dec. extra. n. 6.

e) Zaſ. in d L. legato. n. 22. poſt gloſſ. ibidem.

f) Bar. in L. qui duos. ff. de leg. 1. quæ ſententia communiter approbatur, vt refert. Graſſ. d. §. legatum. q. 62. in fin.

(g) §. optionis. Inſtit. de lega.

Of vncertaintie in reſpect of the time or date of the teſtament.

1 *When it is vncertaine whether of two teſtaments is later, both are voide.*

2 *The teſtament in fauour of children is preſumed laſt.*

3 *The teſtament* ad pias cauſas, *is preſumed laſt.*

4 *The will once proued, is not to be reproued by an other of the ſame date.*

5 *A ſouldier may die with two teſtaments.*

6 *Which of theſe two teſtaments is preſumed later, the teſtament* ad pias cauſas, *or the teſtament* inter liberos.

§.xj.

WHere † two testaments be founde, but vncertaine whether of them is the later: in this case neither testament is good[a], for no man can die with two testaments[b], and so the one testament doth destroy the other[c]. 1

Neuertheless, if the † one testament be made in fauour of the testators children, or of those who are to haue the administration of his goods, in case he had died intestate, and the other testament in fauour of others; then that testament shall preuaile which is made in fauour of the testators children, or of them which otherwise are to haue the administration of his goods[d]. 2

Or if † the one testament be made *ad pias causas*, the other not; then that testament *ad pias causas* is presumed last, and so to take place[e]. 3

Or if † the one testament be proued (the other perhappes not as yet appearing) and the executors in possession of the testators goods by vertue of the testament alreadie proued, it is not afterwards to be reproued, nor the executors dispossessed, by meanes of the other testament of the same date[f]. 4

Or if † the testaments be militarie testaments, for then perhaps they are both good, because a souldier may die with two testaments[g]. 5

Where it is saide, that that testament is presumed later, which is made in fauour of them that

a) Gloss. in L. vlt. C. de edict. Di. Adrian. toll. Clar. §. testm. q. 100.

b) L. quærebatur. ff. de testō mil.

c) Bar. in L. 1. §. 1. ff. de bon. poss. secundum Tabul.

d) Bar. in d. §. 1. Sichar. in L. vlt. C. de edicto Di. Adr. toll. Mantic. de coniect. vlt. vol. lib. 2. tit. 15. n. 17.

e) Ias. & Sichard. in d. L. vlt.

f) Bar. in d. §. 1. Ias. & Sichard. in d. L. vlt.

g) L. quærebatur. ff. de mil. testa.

that are to haue the benefite of the adminiſtration of the teſtators goods, or *ad pias cauſas*, rather then thoſe teſtaments which are not made *ad pias cauſas*, nor in fauour of them which are
6 to haue the adminiſtration: What † if two teſtaments be found, the one in fauour of the teſtators children, or ſuch as are to haue the adminiſtration of the goods of the deceaſed; the other made *ad pias cauſas*, and it dooth not appeare whether of them is former or later, whether is to be preſumed laſt, and ſo of force? I ſuppoſe that if they which are to haue the adminiſtration of the teſtators goods, in whoſe fauour the teſtament is made, be the teſtators children, then that teſtament made in their fauour is to be preſumed later, rather then the teſtament *ad pias cauſas*[h]: otherwiſe the teſtament *ad pias cauſas* is to be preſumed later, rather then that teſtament made in fauour of collaterall kinſmen[i].

h) Mantic. de coniect. vlt. vol. lib. 6. tit. 3. n. 43. Vide ſupra 1. part. §. pen. in fin. & quod ibi adnotaui ex Auguſtino.

i) Mantic. vbi ſupr. per L. ſancimus. C. de ſacroſan. eccleſia.

Of an vnperfect teſtament.

1 *Two ſorts of vnperfect teſtaments.*
2 *Whether a teſtament which is vnperfect in reſpect of ſolemnitie be voide.*
3 *When a teſtament vnperfect in reſpect of will is voide.*
4 *Two meanes whereby teſtaments are ſaide to be vnperfect in reſpect of will.*
5 *Whether the teſtament be voide which is vnperfect by the former of theſe two meanes.*
6 *By the ciuill lawe the teſtament vnperfect in reſpect*

of will is voide.

7 *Whether a testament* ad pias causas *being imperfect in respect of will, be voide.*

8 *That which hath place in testaments* ad pias causas *hath place also in our testaments.*

9 *Whether a testament being vnperfect in respect of will, by the second meanes be voide or not.*

10 *What if the testator after hee haue declared his whole will, reserue somewhat to be done at an other time.*

11 *What if the testator hauing declared his testament doo sende for a Notarie to write, and die in the meane time.*

§.xij.

OF imperfect† testaments there be two 1
sorts, the one vnperfect in respect of *solemnitie*; the other vnperfect in respect of *will*[a].

That testament is said to be vnperfect in respect of *solemnitie*, which wanteth some of the legall requisites, necessarie to the constitution and denomination of a solemne testament[b], of which we haue alreadie spoken[c].

That testament is said to be imperfect in respect of *will*, which the testator hath begun, but cannot finish as he would, being preuented by death, insanitie of minde, or other impediments[d].

The† testament which is vnperfect in re- 2
spect of *solemnitie*, is vtterly voide by the ciuill lawe[e]: but by the lawes ecclesiasticall[f], and especially

a) L. hac consultissima. § ex imperfecto, C. de testa. & ibi Paul. de Castro. Ias & alij. Boer. decis. 240. n. 4. & 5.
b) Sichard. & alij, in d. §. ex imperfecto.
c) Supra 1. part. §. 7. & part. 4 §. 23.
d) Ias. Sichard. & alij, in d. §. ex imperfecto. L. si is qui de testa. ff. L. furiosus. qui testa. fac. poss. C.
e) L. 1. de iniusto testō. ff. L. hac consultissima. §. ex imperfecto. C. de testa. & DD. ibid. Minsing. in §. sed cum paulatim. Instit. de testa. ord. n. 12. Iul. Clar. §. testm̄. q. 89.
f) c. relatum. el. 1. c. cū esses. de testa. extra.

cially by the generall cuſtome of this realme[g], the teſtament is good without any ſuch ſolemnities, ſauing that where lands, tenements, and hereditaments be deuiſed by will, the ſolemnitie of a writing in the life time of the teſtator, is preciſely neceſſarie, without the which the deuiſe of lands, tenements, and hereditaments is meerely void[h].

g) Tract. de repu. Ang. lib. 3. c. 7. Lindw. in c. ſtatutum. de teſta. lib. 3. prouinc. conſt. Cant.

h) per Stat. H. 8. Ian. 32. c. 1. vt refert D. Smith. Tract. vt ſupra. Quod tamen quære.

3 The † teſtanent which is vnperfect in reſpect of *will*, is ſometimes vtterly voide, and ſometimes it is good, ſo farre forth as it is done: which diuerſitie of effects, doth ariſe by the diuerſitie of the meanes whereby the teſtament is vnperfect.

If we would therefore know particularly when the teſtamẽt is vtterly void or not, which is vnperfect in reſpect of will, it behoueth vs to take particular view of the ſeuerall meanes whereby the will of the teſtator is made vnperfect.

4 The † meanes whereby the teſtament is vnperfect in reſpect of will, ſeeme to be two[i]: the firſt is, when the teſtator after he haue begunne to make his teſtament, and intending to proceed further *at that preſent*, is then ſuddenly euen whiles he is making of his teſtament, preuented by death, or inſanitie of minde, or by ſome other impediment, ſo that he cannot finiſh the ſame according to his purpoſe[k].

i) Maſcard. Tract. de probac. verb. teſtim. cõclu. 1352. n. 70. ibi. Secundus caſus. Graſſ. Theſaur. cõ. op. in §. teſtim. q. 19. vbi proponit tres caſus.

k) L. ſi is qui de teſtam. ff. L. furioſum. qui teſta. fac. poſſ. C. Iaſ. & Sichard. in L. pen. de Inſtit. & ſub. C.

The *other* meane is, when the teſtator is not hindered at that preſent time of making his teſtament, but after he haht begun to make his teſtament, deferreth the finiſhing or perfecting thereof

thereof vntill *another time*, and in the meane time dieth, or otherwise becommeth intestable[l].

When † the testament is vnperfect after the first maner, it may seeme that the same is vtterly voide, euen touching that which is alreadie done; yea although the testator had appointed an executor, which is the substance of the testament: and there † is no question, but that by the ciuill lawe it is voide, though it were the testament of the father amongst his children[m]. But whether it bee voide *iure gentium*, and consequently by that law which we vse here in England, is a question not altogether vndoubtfull: and the resolution seemeth to depend vppon the veritie of another question: namely, whether a testament *ad pias causas* being vnperfect with that imperfection of will, be good or not: For if a testament *ad pias causas* be good, notwithstanding such imperfection, then our testaments are also good: and if that testament bee not good; then ours are likewise nought: for these testaments *ad pias causas*, are ruled *secundum ius gentium*[n]; and so are ours[o]. 5 6

Now † that a testament *ad pias causas* being vnperfect in respect of will, is vtterly void, euen touching that which is alreadie done, is holden by a great many of writers, and those of great account and authoritie[p], whose opinion is also testified to be common[q], and highly extolled[r]: 7

l) Oldrad. consil. 119. Paul. de Castr. cons. 75. vol. 1. & consil. 450. vol. 2. Peckius. Tract. de testam. coniug. lib. 1. c. 18.

m) Bar. Bald. Castrens. & alij, in L. hac consultissima §. ex imperfecto. C. de testa. quorum op. com. est, vt referunt Iul. Clar. §. testm. q. 9. & Michael. Graff. Thesa. com. op. §. testm. q. 12.

n) Panor. in Rub de testa. extr. n. 9. Tiraquel. de priuileg. piæ causæ. c. 3. & c. 5. Corne. cons. 307. Couar. in c. relatũ. el. 1. n 6. Paul. de Castr. consil. 75. circa medium. vol. 1. & consil 450. vol. 2. Graff. Thesaur. com. op. §. testm. q 18. vbi dicit hanc op. com. esse iure can.

o) Dixi supra part. 1. §. 9.

p) Bald. in rep. L. 1. de sacrosan. eccle. C. q. 6. Angel. in L. si is qui de testa. ff. Fulgos. consil. 117. Anch. in c. 2 de testa. extr. Are. in d. L. si is qui. Boer. decis. 240 Vasq. de succes. creat. §. 22. n. 6. Paris. consil. 24. vol. 3. Tho. Gram. decis. 62 Sichard. & Curtius Iun. in d. L. hac consultissima. §. ex imperfecto.

q) Iul. Clar. §. testm. q. 7. Immo magis est com. ait. Graff. (r) Ab hac opinione in Prax. non licere recedere scripsit Ruinus. consil. 7. n. 8. vol. 3. Eand. op. esse non modo com. sed canonicam & verissimam, laudat Vinius. Thesau. com. op. verb. testamentum. tandem magis communem esse, asserit Graff. §. test. in q. 19.

their

their reason is, because in this case here is defect of consent, without which consent no testament is good[s]. There is defect (say they) of consent in this case, because testators whiles they are making of their testaments, vntill they haue finished the same, doo put in, and put out, they adde, they reuoke, and they alter manie things alreadie by them disposed[t]: Other reasons also they haue, the which in my opinion are not altogether so forceable[v].

On the contrarie, others whose not onely number is more exceeding, but authoritie and estimation more excellent, are of this opinion, that where the testator hath begunne his testament, and hath bequeathed certaine legacies *ad pias causas*, and intending at that present to proceed further, is then suddenly by death or other impediment preuented, or hindered, that he cannot finish his testament: neuertheless those legacies alreadie made *ad pias causas*, are not thereby infringed, but do continue still firme and effectuall, as if the testator had finished his testament, according to his former purpose[x], and this their opinion is testified to be more commonly receiued[y]. The reason of their opinion is, because touching those legacies alreadie giuen, there is no defect of naturall consent[z]: For although there bee imperfection of will in respect of his whole testament, because the testator cannot absolutely finish the same according to his purpose: yet in respect of that which is done, there is no imperfection of will[a] (the perfect is not to be hurt by the imperfect[b])

And

s) Sichard. in d. §. ex imperfecto.
t) Clar. §. testim. q. 7.
v) Nempè quod testm. ratione voluntatis imperfectum, non valet inter liberos, ergo nec fauore piæ causæ: Sed negatur argumentum per ea quæ superiùs dicta sunt prima parte de priuileg. vtriusque testamenti.
x) Bar. & Imola. in L. is qui. ff. de testa. Castren. consil. 456. vol. 1. Panor. in c. 1. de successi. ab intestat. extr. Alex. in L. hac consultissima. §. ex imperfecto. C. de testa. Arc. in §. fin. Inst. quib. mod. testa. infir. Ias. consil. 15. vol. 4. Socin. Tract. reg. & fal. reg 300. Ioh de Ana. consil. 7. Barba. consil. 42. vol. 4. Calca. consil. 13. Dec. in c. 1. de fide instr. extr. Tiraquel. de priuileg piæ causæ. c. 7. Mascard. de probac. verb. testm. Couar. in c. relatum. cl. 1. de testa. extr.
y) Tiraquel. Tract. de priuileg. piæ causæ. priuileg. 7. Mascard. de probac. verb. testm.
z) Panor. in d. c. 1. de success. ab intestat. extra.
a) Tiraquel. de priuileg piæ causæ. priuileg. 7. Dec in c. 1. de fide instr. extr.
b) c. vtile. de reg. iur. extra.

And albeit teſtators whiles their willes and teſtaments are in making doo many times adde and diminiſh, and alter diuerſe things, yet who is able to ſay that concerning this, or that particular legacie alreadie giuen, the teſtator would haue made any addition, diminution, or alteration: The preſumption is rather to the contrarie, for perſeuerance and not mutation of will is preſumed[c]. In deed if it can be prooued that the teſtator did meane at that preſent to alter thoſe legacies before giuen ere he had finiſhed his teſtament and could not, being then ſuddenly preuented by death, or otherwiſe, then the former opinion hath place[d], that the diſpoſition is voide, otherwiſe not[e].

c) L.eum qui voluntatem ff.de probac.

d) Paul.de Caſtr.in L. iubemus.de teſta.& DD.in L.pen.de Inſtit. & ſub.C.

e) Quia nemo preſumitur habere plus in corde quam in ore. Bald.in L.ſi is qui.ff.de teſta.

By † this now which hath beene ſpoken of teſtaments *ad pias cauſas*, we may iudge whether our teſtaments here in England bee good or not, when they be inperfect by the firſt meanes, viz. where the teſtator whiles he is in making his teſtament, after he haue appointed an executor, or giuen ſome legacies, and intending to proceed further, is euen then ſuddenly interrupted and hindered, that he cannot finiſh the ſame accordingly. 8

When † the teſtament is imperfect by the ſecond meanes of imperfection of will, that is to ſay, when the teſtator after he haue begun to make his teſtament, doth put off or defer the finiſhing thereof vntill *an other time*, and in the meane time dieth, or is otherwiſe letted, that he cannot make an end thereof, as he meant, howſoeuer by the rigour of the *ciuill lawe* the teſtament 9

mẽt in this caſe may ſeeme to be void, cuẽ touching that which is alreadie done[f]: yet by that *lawe which this realme of England doth admit*, in this caſe (I meane *ius gentium*) concerning thoſe things alreadie diſpoſed, the teſtament is not voide by the reaſons before alledged. For as in the former caſe the legacies alreadie giuen are not voide, where the teſtator cannot finiſh his teſtament as he woulde at that time: ſo in this caſe, the legacies before diſpoſed, or the conſtitution of the executor befor made, dooth not become voide, where the teſtator cannot finiſh his teſtament as he purpoſed at another time[g].

f) Paul. de Caſtr. conſil. 450. vol. 2.

g) Cum igitur eadem ratio in vtroque caſu militet, idem etiam ius conſtitui oportet. Nec caſus diuerſitas, ſed rationis identidas inſpici debet Aymo Grauetta. conſil. 190.

10 Much leſſe † is that teſtament voide, where the teſtator hauing declared his whole will and intending to do no more at that preſent, reſerueth ſomewhat to be done at another time, and in the meane time dieth: For euen by the ciuill law in this caſe the teſtament is perfect, notwithſtanding ſuch reſeruations[h]. Wherefore if the teſtator after that he hath made his will, do ſay that he wil adde, diminiſh, or alter any thing in his will the next day, and die in the meane time, before any ſuch additions, detractions, or alterations be made, the teſtament is not to be noted of imperfection by any ſuch reſeruation of adding, diminiſhing, or altering his teſtament; becauſe theſe things may be don by way of codicill, without the which the teſtament is ſufficiently perfect[k], and eſpecially the teſtament remaineth firme and effectuall, where the teſtator dooth ouer-liue the time by him preſcribed

h) Aret. Iaſ. & Sichard. in L. pen. C. de Inſtit. & ſub. Graff. Theſaur. com. op. §. teſtm. q. 12. n. 4. quam ſententiam communiter receptam monſtrat. poſt Lud. Zant. Reſponſ. pro vx. n. 302.

i) Simo. de Prætis. de Interp. vlt. vol. lib. 1. fol. 195. Io. de Ana. conſ. 44

k) Sichard. in L. pen. de Inſtit. & ſub. C. in fin.

scribed for such additions, diminutions, or alterations, for then he is presumed to haue repented him of such additions, by not dooing the same when he might[l].

l) Alex. cons. 74. vol. 1. Olden de action. class. 5. fol. 498. Paul. de Cast. in L. iubemus. C. de testa.

Hereunto † it may be added, that where 11
the testator hauing declared his whole will before witnesses, causeth the [a] Notarie or Scribe to be called vnto him intending to haue the same committed to writing, for a more sufficient proofe of his testament, and before the comming of the Notarie dieth: In this case the testament is good, and ought to preuaile as a Nuncupatiue testament[m]: neuertheless, if it may be prooued, that the testator did restraine himselfe to the written testament, and that it was his will and meaning, that the testament should not be of force, vnlesse it were written, then the testator dyeth in the meane time before it be written, the testament shall not be allowed as a Nuncupatiue testament, & so not at all.[n]: But it is not presumed, by sending for a Notarie, that otherwise the testator would that his testament should take no place, vnlesse it were writte[n]°, but rather for a more ready proofe of his will[p].

m) Alex. in L. hac consultissima. §. ex imperfecto. C. de testa. Grass. Thesaur. com. op. q. 12. n. 6. Mantic. de coniec. vlt. vol. lib. 1 tit. 7. n. 6. vbi ostendit hanc op. esse com.

n) Bar. post Dyn. in L. vlt. ff. de iure codicill. Oldrad. consil 119. Castrens. consil. 75. vol. 1. & cons. 450. vol. 2. Peckius. de testa. coniug. lib. 1. c. 18. Grass. Thesaur. com. op §. testm. q. 11. el. 1.

o) Couar. in c. relatum. el. 1. de testa. extra. n. 11. ibi tertia conclusio. Mantic. d. c. 7. n. 6.

p) Grass. d. §. testm. q. 12 in fin.

Of defect in the testators meaning.

1 *No testament good without a firme resolution of the minde to make a testament.*

2 *Wordes vttered rashly, or vnaduisedly done, not import a firme purpose in the testator.*

3 *It is the minde and not the words which giueth life to the teſtament.*

4 *What is to be conſidered to prooue a firme intent of making a teſtament.*

5 *Of the draught of a will in writing.*

6 *If a writing be founde in manner of a will, whether is it preſumed the verie will, or but a draught thereof.*

§. xiij.

1 IF the † teſtator haue not *animum teſtandi, that is a firme reſolution, or aduiſed determination of making his teſtament*, his teſtament is voide, or rather
2 no teſtament[a]. And therefore † if any man raſhly, vnaduiſedly, incidently, ieaſtingly, or boaſtingly, and not ſeriouſly, nor with a firme purpoſe to make his will, do ſay and affirme (as oftentimes it happeneth) that he will make ſuch a man his executor, or will leaue vnto him all his
3 goods, this is no teſtament[b]: For † it is the mind and not the wordes of the teſtator, that giueth
4 life to the teſtament[c]. Which † minde or earneſt purpoſe ought to be proued by circumſtances[d], as that the teſtator was verie ſicke when hee ſpake theſe wordes[e], or that he did require the witneſſes to beare witneſſe thereof[f], or that hee framed and ſetled himſelfe earneſtly to the making of his teſtament[g], or by other circumſtances of like effect[h], wherein the Iudge is to conſider the condition of the perſon ſpeaking the words, the time, the place, the occaſion, the ma-

a) L. Diuus. ff. de mil. teſta. §. plane. Inſtit. de mil. teſta.

b) L. vlt. ff. de teſta. & DD. ibi, & in d. L. diuus & §. plane. Hottoman. conſ. 5. vol. 1. Socin. iun. conſil. 179. vol. 2. Pariſ. conſil. 89. vol. 3. Hyero. Franc. in L. qui quid. de reg. iur. ff.

c) Mantic. de coniect. vlt. vol. lib. 2. tit. 15. in fin. L. ex feodo. ff. de hæred. inſtit. Atq; huc pertinent quæ ſuperiùs à me ſcripta ſunt in explicatione definitionis teſtamenti. verb. ſententia. 1. part. §. 3.

d) Gloſſ. in §. plane. Inſtit. de teſta. mil.

e) Gloſſ. in L. diuus. ff. de mil. teſta.

f) eadem gloſſ. in d. L. diuus.

g) Gloſſ. in d. L. plane.

h) L. Pamphilo. §. propoſitum. ff. de leg. 3. & DD. ibidem.

ner of speech, and in whose presence[i], and namely whether the words were of the present or future time[k]: and if the words be of the future time, then whether they bee such as doo import the accomplishment of the act, or but the beginning onely: for those of the former sort being executorie, are equiualent to woordes of the present time[l]: By which circumstances the discreete Iudge may the better collect, whether he that vttered the words had a minde or purpose thereby to make his testament or not[m].

As wordes † onely without a constant purpose of making a testament, do not make a testamēt, so that writing which is prepared or destined for a draught or image of the testators will onely, or for a more readie direction of the testator wherby to make his testamēt afterwards, is no more to be accounted a testament before it be acknowledged by the testator for his testament[n], then is the draught of a sentence to be taken for a sentence, vntill it be pronounced by the Iudge[o], or the draught of an obligation is to be accounted for an obligation before it be sealed and deliuered by the oblige as his acte and deede[p].

Notwithstanding I do not hereby meane, that it is alwayes necessarie the testator should acknowledge before witnesse the testament by him written, to be his last will and testament, or that it is alwayes necessarie, that he should subscribe his name, or put his seale thereunto, for the testament written with the hand of the testator, may be good without anie of these things

§

i) Menoch. de arbitr. Iud. lib. 2. centur. 5. cas. 496.

k) Paul. de Castr. in L. fin. ff. de testa. Hottom. d. consil. 5.

l) Alciat. Ripa. & alij, in L. serui electione. ff. de leg. 1.

m) Menoch. d. cas. 496. ex quo abunde hauri-re poteris, vnde sitim tuum extinguas.

n) L. ex ea scriptura. de testa. L. fideicommissa. §. 1. de leg. 3. ff.

o) L. 2. & 3. de senten. ex breuiloqua recit. C. c. fin. de re iud. 6. Vantius de nullitat. viz. de null. ex defectu processus, &c n. 69. 70. Bald. in d. L. fideicommiss. §. 1. Euerard. consil. 155. n. 8.

p) L. contractus. C. de fide Instr.

things, as heretofore I haue confirmed [q].

6 But now this doubt may ariſe, what † if a writing bee found written indeede with the hand of the teſtator in maner of a will, wherein he hath diſpoſed his goodes and appointed an executor, but the writing is neither ſealed with the teſtators ſeale, nor ſubſcribed with his name, nor by him acknowledged before witneſſes, to bee his laſt will: whether ſhall this writing be accounted to be a draught of the teſtators will, or the teſtament it ſelfe? I ſuppoſe that the ſolution of this queſtion, reſteth in the varietie of circumſtances: For if the *writing be vnperfect* [v], for that perhaps the teſtator dooth leaue of in the middeſt of a ſentence [t], and without any date [t], or if the ſame bee written with ſtraunge characters [u], or if the ſame be written in paper, and great diſtance betwixt euery line, with diuers emendations and correctionsmade betwixt the lines [x]: if alſo the ſame be founde amongſt other papers of ſmall value or account [y], by theſe circumſtaunces it ſeemeth rather a draught or preparation to a teſtament, then the teſtament it ſelfe [z]. But on the contrarie, if the *writing be perfect or fullie finiſhed*, hauing a certain date of the day, moneth, and yeare, and be written with vſual and accuſtomed letters in parchment, without corrections, and with ſmall diſtance betwixt the lines; and alſo found in ſome cheſt of the teſtator amongſt other writings of the teſtators, of great value and moment: by theſe circumſtances it ſeemeth rather to be the very teſtament it ſelfe, then a draught onely [a].

q) Supra part. 4. §. 25.

r) L. ex ea ſcriptura de teſta. L. fideicommiſſa. de leg. 3. ff.

s) Bald. & Angel. in d. L. ex ea ſcriptura Euerard. conſ. 155. n. 9.

t) Auth. quod ſine. C. de teſta. Euerar. d. conſil. 155. Non tamen affirmo neceſſarium [illegible] vt tempus inſcribatur, prout ius ciuile in omni teſtamento, etiam inter liberos exigit, ſed quia communiter apponi ſolet tempus à noſtratib⁹ in ſuis teſtamentis ſcriptis, omiſſio igitur temporis (argumento à cõmuniter ac cidentibus) denotat præparationem rei, potius q̃ ipſam rem.

v) L. quoties. § 1. ff. de hæred. inſtit. Bar. Bald. Ang. & alij ibidem. Nõ quòd idcirco vitioſum ſit teſtũ. quia ſcriptum notis vel zypheris inuſitatis maxime iure gentium attento: ſed quod deducto argumẽto à cõmuniter accidẽ. præparatio magis quã res ipſa videatur, quia perpauci vera ſua teſtamenta literis vel characteribus inuſitatis conſcribant.

x) Paul. de Caſtr. Sich. & alij, in L. contractus. C. de fide inſtr.

y) DD. in D. Auth. quod ſine.

z) Euerard. d. conſ. 155.

a) DD. in d. Auth. quod ſine. Euerard. d. conſil. 155. Adde quæ ſupra ſcripſimus. part. 4. §. 25.

Of a later testament.

1 Diuerse meanes whereby the testament being good at the first, is afterwards infringed.
2 A man may make as many testaments as he list.
3 Onely the last testament is of force.
4 This conclusion that the later testament dooth infringe the former, diuersly extended.
5 The same conclusion diuersly restrained.
6 Of the clause derogatorie of future testaments.
7 Questions about clauses derogatorie.
8 Of clauses derogatorie, some are derogatorie of the power of making testaments, some of the will.
9 When the clause is derogatorie of the power of making testaments, mention or reuocation thereof is not necessarie.
10 When the clause is derogatorie of the will of making testaments, then it is needful to make mention thereof.
11 Certaine cases wherein mention or reuocation of the testament derogatorie is not necessarie.
12 Three manner of reuocations, generall, speciall, and singular.
13 The force of the generall reuocation.
14 The effect of the speciall reuocation.
15 The effect of the singular reuocation.
16 The effect of generall mention.
17 The effect of particular mention.
18 How a testament may be reuoked, wherein is a special clause derogatorie circumscribed with certaine limites.
19 What is chiefly to bee obserued about those testaments,

ments, wherein be clauses derogatorie.

20 *Clauses derogatorie of small force in the testaments of simple persons.*

21 *What if two testaments appeare, but doth not appeare whether of them is later.*

§. xiiii.

1 IT hath beene signified alreadie, that † a testament which is good and lawfull at the beginning, may afterwards become voide by diuerse meanes [a]: as by *the making of a later testament* [b], and by *reuoking* [c] *and cancelling* [d] the testament made, by *alteration of the testators state* [e], by *forbidding or hindering the testator* to make another testament, or to correct the former, and by diuerse meanes hereafter ensuing [g].

a) Supra ead. part. §. 1.
b) In hoc ipso §.
c) Infra §. 15.
d) Infra §. 16.
e) Infra § 17.
f) Infra §. 18.
g) Infr. §. 19. 20. cum sequen. vsque ad finem libri.

Concerning the first of these meanes, that is to say, the *making of a later testament*, so large and ample is the libertie of making testaments;

2 that † a man may as oft as hee will make a newe testament, euen vntill the last breath [h], neither is there any cautele vnder the sunne to preuēt this libertie [i]. But no man can die with two testa-

3 ments [k], and therefore † the last and newest is of force [l]: so that if there were a thousand testaments, the last of all is the best of all, and maketh voide the former [m].

h) L. 4. ff. de adim. lega. Mantic. de coniect. vlt. vol. lib. 12. tit. 1. n. 1.
i) Bar. in L. si mihi. §. in legatis. ff. de leg. 1. Olden. de action. class. 5. in prin fol. 497.
k) L. ius nostrum. de reg. iur. ff. L. sancimus. C. de testa.
l) §. posteriore. Instit. quib. mod. testa. infir.
m) Paris. consil. 10. lib. 3 n. 4.

4 This † conclusion, that the later dooth infringe the former, is diuersly enlarged. First the later testament dooth infringe the former, albe-

it the executor of the later do refuse the executorship, or die, either during the life of the testator, or after his death [n], for it is sufficient that once he might haue beene executor[o]. Secondly, the later testament doth infringe the former, albeit the prince or Emperour himselfe were appointed executor of the former[p]. Thirdly, the later testament doth make frustrate the former, albeit the former were a written testament, and the later but a nuncupatiue testament[q]. Fourthly, the later dooth infringe the former, albeit there be no mention in the second testament of reuoking the former[r]. Fiftly, the later testament dooth reuoke the former, albeit in the former there bee a clause derogatorie of willes and testaments afterwards to be made[s]: but thē whether it be necessarie, that in the later testamēt there be mentiō or reuocation of that former testament, or of the clause derogatorie, is hereafter declared[t]. Sixtly, the later testament doth make voide the former, albeit there be xx. witnesses of the former, and but two of the later[v]. Seuenthly, the later testament dooth take away the former, albeit in the former testament the executor is appointed simplie or without condition, & in the later conditionally, and the same condition also violated[x], so that the condition be of something then to come at the time when the condition was made. But if the executor of the later testament be made vppon some condition then present, or past, the condition not existing, the former testament is not reuoked[y]. Eightly, the later testament doth make voide

n) d §. posteriore. Instit. quib. mod. testa. infir. Mascard. Tract. de probac. concl. 1282. n. 2.

o) Eod. §. posteriore.

p) L. si quis. C. qui testa fac. poss.

q) Vasq. de succes. resoluc. lib. 1. §. 1. n. 26. 27 Perkins. tit. testament fol. 92.

r) Minsing. & Vigli. in d. §. posteriore.

s) Bar. in L. si mihi & tibi. §. in legatis. ff de leg.

t) Infra §. 15.

v) Couar. in Rub. de testa. extr. part. 2. in prin. Vasq. de succes. resolu. lib. 1. §. 1.

x) d. §. posteriore. Instit. quib mod. testa. infir.

y) Minsing. in d. §. posteriore. n. 6.

void the former, albeit the teſtator haue ſworne not to reuoke the ſame[z], the othe alſo being reuoked together with the teſtament[a].

z. Couar. in Rub. de teſta. extra. part. 2. n. 9.
a) Iul. Clar. §. teſtm̃. q. 94. Graſſ. Theſaur. cõ. op. §. teſtm̃. q. 87. & hoc (inquit) eſt valdè notandum.

The reſtrictions † of this former concluſion are theſe: Firſt, the later teſtament dooth not make voide the former, when the later is vnperfect, in reſpect of the teſtators will[b]; and not in reſpect of ſolemnitie[c]. Secondly, the later teſtament doth not make voide the former, when it is vehemently ſuſpected that the teſtator was compelled to make the later teſtament by feare, or violence[d]. Thirdly, the later teſtament doth not make voide the former, when it is ſuſpected that the teſtator was induced to make the later by fraude or deceite[e]. Fourthly, the later teſtament doth not take away the former, the later being made at the interrogation or ſuggeſtion of ſome other perſon[f], eſpecially when the teſtator is very ſick, & in peril of death[g]: for then it doth not take away the former, made by the proper motion of the teſtator[h], vnleſſe it appeare plainly of the expreſſe will of the teſtator to reuoke the former[i], or vnleſſe the teſtator himſelfe did dictate the teſtament[k], or vnleſſe the later teſtament be in fauor of the teſtators childrẽ, or others, who were to haue the adminiſtration of his goods if he died inteſtate[l]. Fiftly, where the teſtator hath made two teſtaments, a former and a later, both being written; and the ſame teſtator afterwardes lying ſicke vppon his death bed, ſome neighbour of his preſenting to the teſtator both the teſtaments, willing him to deliuer to them which of theſe teſtaments he will

b) §. ex eo Inſtit. quib. mod. teſta. infir. L. ſancimus. C. de teſta.
c) Supra hoc ipſo §. Ampliac. 3. & 6.
d) Simo de Prætis. de Interp. vlt. vol. lib. 4. fol. 226. n. 49. ſed an ſufficiat probac. per vnicum teſtẽ, vide ibid.
e) Simo de Prætis. vbi ſupr. & ſupra ead. part. §. 3.
f) Zaſ. conſ. 3. vol. 1. n. 41. Aymo. conſil. 10 n. 13. Apoſtil. ad Ripam. in L. 1. §. ſi quis ita ff de verb. ob. n. 9. vbi dicitur hanc op. eſſe com. & ſupra ead. part. §. 4.
g) Socin. Iun. conſil. 148 vol. 2. n. 15.
h) Vide quæ ſcripſi ſupra part. 2. §. 26.
i) Gabriel. lib. 4. com. concluſ. tit de teſta. concluſ. 2. n. 9. poſt Rui. conſ. 12 n. 11, vol. 2.
k) Gabriel. ibid. n. 21, in fin.
l) Socin. Iun. conſil. 144. n. 15. vol. 2.

ſhal ſtand for his laſt wil, if the teſtator being of perfect minde and memorie, ſhall deliuer to them the former teſtament: In this caſe the teſtament ſo deliuered ſhall be the teſtators laſt will, albeit it were firſt made[m]. Sixtly, the ſecond teſtament dooth not reuoke the former, when the ſecond teſtament dooth not in any wiſe diſſent from the former, but agreeth with the ſame in all points, eſpecially if the later were made verie ſhortly after the former, for then they both ſeeme but one teſtament in diuers writings[n]. Seuenthly, the former teſtament is not reuoked, when in the later will, there be no executors named, for then the later is but a codicill or addition to the former teſtament, wherein executors be named[o]. Eightly, the former teſtament is not reuoked by the later, where the teſtator dooth take an othe not to reuoke the former, vnleſſe there be expreſſe mention of the ſame teſtament, or of the othe[p]. Nienthly, the later teſtament doth not take away the former, when it is made in heate of anger, and diſpleaſure conceiued by the teſtator againſt the executor of the firſt teſtament, whereas afterwards they be reconciled and ioined in amitie as before[q]. Tenthly, the † former teſtament wherein 6 is a clauſe derogatorie of willes and teſtaments afterward to be made (as if the teſtator ſay, *What ſoeuer teſtament I ſhall hereafter make, I will that the ſame be of no force, &c.*) is not alwais infringed by the later teſtament, vnleſſe there be ſufficient mention or reuocation of the former teſtament or clauſe derogatorie[r].

If

m) Perkins. tit. teſtament. fol. 92.

n) Vigl. in d. § poſteriore. Inſtit. quibus modis teſta. infir.

o) Inſtit. de Codicil. vide ſupra part. 1. §. 5.

p) Vaſq. de ſucceſſ. reſoluc. lib. 1. §. 1. n. 32. Graſſ. Theſaur. com. op §. teſtm. q. 86. Iul. Clar. §. teſtm. q. 94. n. 5.

q) L. quicquid de reg. iur. ff. Mantic. de coniect. vlt. vol. lib. 12. tit. 1. n. 25.

r) Gloſſ. in L. ſi mihi & tibi. §. in legatis. ff. de leg. 1. quam communiter receptam dicit Iaſ. in L. Horatius. ff. de lib. & poſthu.

If you demaund in what † cases mention or reuocation is to be made of the former testament hauing a clause derogatorie, and in what maner this mention or reuocation ought to be made, and is sufficient for the reuoking of the former testament, with the clause derogatorie: Surely this question, especially concerning the maner of mention or reuocation to be made in the second testament, is very difficult, and such as in the answering whereof, the writers doo fight amongst themselues mightily, and doo contradict one another verie strongly[s], so that the victorie is verie doubtfull, and verie hard it is to know whether opinion is truer, or more commonly receiued. Others labouring to reconcile these cõtradictions, and to pacifie these contentions, haue waded so farre for fine and daintie distinctions, that they seeme to swimme vp and downe, and to flote hither and thither, I know not whither, in a deepe and bottomlesse sea of intricate & confused diuisions[t], so that if a man would aduenture to followe them to the end of their voiage, he might well doubt whether euer he should obtaine any hauen or safe landing: wherefore for mine owne part, I thought to wade no further from the shore then I should find fast footing, & where I might be within the readers reach.

s) Vt prius per Couar. in Rub. de testa. extra. part. 2. & per Iul. Clar. §. testim. q. 99. & per Grass. Thesaur. com. op. §. testim. q. 89. & per Mantic. de coniect. vlt. vol. lib. 12. tit. 8.

t) Par. in l. si quis in prin. de leg. 3. Michael. Grass. §. de testim. q. 89. DD. in L. si mihi & tibi. §. in legatis. ff. de leg. 1.

8 Concerning the question therefore, first of all we are to vnderstand † that of clauses derogatorie there be two sorts, the one derogatorie of the *power* of making testaments, the other derogatorie of the *will* of making testaments[v]: Ex-

v) Clar. Grass. Couar. vbi supra. DD. in d. §. in legatis.

ample of the first is, whē the testator vseth these
„ or the like words: *I doo from henceforth renounce*
„ *the power of making any other testament:* Or thus; *I*
„ *will that hereafter I haue no more libertie or authori-*
„ *tie to make mo willes or testaments, &c.* Example
„ of the second; when the testator vseth these or
„ the like words: *If I make any testament hereafter,*
„ *I will that the same be of no force*: or thus; *If I*
„ *make any testament hereafter, except therein I write*
„ *the Lordes praier, my minde and will is that the same*
be voide and of none effect[x]. The vse of this distinc-
tion or difference betwixt clauses derogatorie of power and of will is this.

x) DD. in d. §. in legatis. Couar. in d. Rub. Clar. & Grass. vbi supr.

If† the clause be derogatorie of the *power or libertie* of making of testaments, & afterwards the testator maketh another testament, it is not needfull therein to make any mention, or reuocation of the former testament, or clause derogatorie therein conteined[y], for the former is taken away by the second, as if there had not bene any such clause derogatorie therein at all: the reason is, because the clause derogatorie of the power of making testaments is vtterly voide in law, neither can a man renounce the power or libertie of making testamēts[z], neither is there any cautele vnder heauen to preuent this libertie[a], which also indureth whiles any life endureth[b], as hath bene aforesaid. 9

y) Bar. in L. si quis in prin. de leg. 3. Ias. in d. § in legatis. Clar. § testm. q. 99. n. 2. Grass. § testm. q. 89. n. 3.
z) Bar. d. L. si quis. n. 4. Clar. & Grass. vbi supr.
a) Bar in d. §. in legatis Olden. de action. class. 5. in prin. fol. 497. Mantic. de coniect. vlt. vol. lib. 12. tit. 1. n. 1.
b) L. 4. ff. de adimen. legatis.

If† the clause be derogatorie of the testators *will*, then it is necessarie that in the later testament there be mention or reuocation of the testament with the clause derogatorie, otherwise the former testament is still in force[c]: the 10

c) Bar. in L. si quis. de legatis. 3. Clar. § testm. q. 99. Grass. § testm. q 89.

reason

reason is, because there is presumed a defect of the testators will in the second testament, and that his meaning is not to haue the former reuoked, without making mention of the former derogatorie testament[d].

11 Neuertheless † it is not perpetually true, that the testament wherein is a clause derogatorie of the testators *will*, is not infringed by the later testamẽt, wherein is no mention or reuocation of the former testament derogatorie, for it faileth in diuers cases. The first case is, when it may be prooued by other coniectures, that it was the testators meaning, that the former testament should be reuoked[e]. Another case is, whẽ there be ten yeares expired from the time of the first testament[f]. The third case is, when the testator dooth with an othe confirme the later testamẽt[g]. The fourth case is, when the second testament is made in fauour of the testators children[h], or some other person intirely beloued of the testator[i]. The fift case is, when the executor named in the former testament after the making thereof dooth grieuously offend the testator[k].

For the other question, (viz. *what maner of reuocation is to be made in the second testament*, that it may suffice to reuoke the former testament, wherein is a clause derogatorie of the will of
12 the testator) we must note † that there be three sorts of reuocations, one *generall*, another *speciall*, the third *singular, or indiuiduall*[l]. *Generall*, when the testator in his later testament vseth these or the like wordes: *I will that this testament shall*

d) Couar. in d. Rub. de testa. extra. part. 2. Clar. & Graff. vbi supra Mantic. de coniect. vlt. vol. lib. 12. tit. 8. Paris. consil. 10. vol. 3 n. 9. 24. &c.

e) Couar. in d. Rub. 2. part. n. 19. vers. quart. conclus. Paris. consil. 10. vol. 3. n. 21. Graff. d. q. 89. n. 6. Clar. d. q. 99 n. 8. Mantic. de coniec. vlt. vol. lib. 12. tit. 8. n 13. Mascard. de probac. conclus. 1282. n. 43.

f) Bald. in L. sancimus. C. de testa n. 4. Graff. d. q. 89. n. 10. Clar. d. q. 99. n. 19.

g) Bald. in d. L. sancim⁹ in fin. Graff. d. q. 89. n. 8. Clar. d. q. 99. n. 10.

h) L. vlt. C. de Curator. furios. Graff d. q. 89. n. 9. Mantic. d. tit. 8. n. 27.

i) Iaf. in d. L. sancimus. C. de testam. limi. 6.

k) Iaf. in d. L. sancimus. lim. 2.

l) Graff. Thesaur. com. op. § testũ q. 89. n. 4. Clar. § testũ q 99. n. 7. Mantic. de coniect. vlt. vol. lib. 12. tit. 8. n. 6.

„ *shall stand, notwithstanding any other will or testa-*
„ *ment by me heretofore made:* or thus; *I reuoke and*
„ *make voide all former willes and testaments, &c.*
„ Speciall when the testator hath these or the like tearmes. *I doo hereby reuoke all former testaments, notwithstanding any clause derogatorie in the same.* Singular, wherin the testator saith, *I make my last wil and testament, notwithstanding that clause derogatorie of my former will, that I would not haue that testament reuoked, vnlesse I should insert in this testament the Lordes praier.* Or thus: *Notwithstanding that clause derogatorie in my former will, wherby I would that no will or testament afterward to bee made should preuaile, albeit I should specially derogate from the former.* Or thus: *Notwithstanding that wil where I made such a person my executor.* Or thus: *Notwithstanding that will which I made in such a place, at such a time, and before such witnesses, &c*[m]. These distinctions obserued, I make these conclusions.

13 The first conclusion is, that † if in the later testament there be a *generall reuocation*, as notwithstanding all former testaments, &c. the former testament wherein is a clause derogatorie of the testators will, is not thereby taken awaie[n], albeit there bee but one former testament[o].

14 The second conclusion is, that † if in the second testament there be a *speciall reuocation*, as notwithstanding any testamentes with their clauses derogatorie, &c. the former testament with the clauses derogatorie of the testators wil is thereby taken away[p].

The

m) Bar. in L. si quis in prin. ff. de leg. 3. Couar. in Rub. de testa. extra part. 2. n. 19. Clar. §. testm. q. 99. Grass. §. testm. q. 89. Mantic. de cõiect. vlt. vol. lib. 12. tit. 8.

n) Bar. in d. L. si quis. Socin. Iun. in cand. L. n 24. Grass. Thesau. com. op. § testm. & hæc opinio (inquit ille) est vera. q. 89. n. 4.

o) Iaso. in L. sancimus C. de testam. quæ sententia communis est. teste Grass. d. q. 89. n. 5. contrarium Bar. in d. L. si quis, cuius opinio cõmuniter reprehẽditur, asserit Tobias Nonius consil. 26. col. 2. & secũdum communem opinionem esse pronunciandum à Iudice, monet Tiraquel. de leg. conub. gloss. 7. n. 131. Clar. d. q. 99. n. 3. affirmans quòd in lib. suo aut Bar. verba sunt corrupta, aut non fideliter à Doctoribus recitata. Tu igitur consulas librum proprium.

p) Dy. in c. quod semel de reg iur. 6. Alex. d. L. sancimus. Clar. §. testm. q. 99. n. 4. & per eum cenetur communis opinio.

15 The third concluſion is, that † if in the ſecond teſtament there be a *ſingular reuocation* of the former teſtament, *as notwithſtanding ſuch a teſtament made before ſuch a Notarie, &c.* the ſame former teſtament hauing therin a general clauſe derogatorie, is ſufficiently reuoked, although in the ſecond teſtament there be no mention of the clauſe derogatorie in the former teſtament[q].

16 The fourth concluſion is this †, that if in the former teſtament, there be a ſpeciall clauſe derogatorie, the ſame is taken away by the ſecond, wherein is generall mention made of the former teſtament, and of the clauſe derogatorie[r].

17 The fift concluſion is †, that if in the former teſtament there bee a ſpeciall derogatorie clauſe, the ſame is not taken away by the ſecond teſtament, wherein is particular mention of the ſame teſtament without mention of the clauſe derogatorie[s].

18 The ſixt concluſion ſhall be, that † if in the former teſtament there be a ſpecial clauſe derogatorie, circumſcribed with certaine limits: for Example; *I will that this teſtament ſhall ſtand, notwithſtanding any other to be made hereafter, vnleſſe in the ſame I ſhall write, or cauſe to bee written the Lordes praier, &c.* The ſame former teſtament may be taken away by a ſecond, albeit the lords praier be not written in the ſame[t]: but then it is behouefull that in the ſecond teſtament there be mention, not onely of the teſtament, but alſo of the clauſe derogatorie: as, *I will that this later teſtament ſhall ſtand, notwithhanding any former*

q) Bar. in d. L. ſi quis. n. 8. Couar. in d. Rub. de teſta. extr. n. 19. verſic. cert. concluſ. qui ibi atteſtatur hanc op. eſſe & com. & veriorem.

r) Bar. in d. L. ſi quis. col. 3. DD. in d. L. ſancimus. Couar. in d. Rub. de teſta. n. 19. verſic. cert. concluſio. vbi dicit hanc op. eſſe com.

s) Paul. de Caſtr. conſil. 206. vol. 1. Couar. in d. Rub. n. 19. verb. primum in queſtione.

t) Bar. in d. L. ſi quis. Couar. in d. Rub. n. 19. verb. ſecundum Apoſtil. ad Bar. in d. L. ſancimus. C. de teſta. Bald. conſil. 178. vol. 4.

mer testament by me made conteining whatsoeuer wordes or clause derogatorie: Which done, the former testament is taken away[v].

v)Bar.in d.L si quis. Paul de Castro.consil. 284.vol 1.Couar.in Rub.de testa.extr.part. 2.n 19.Mantic. de coniect.vlt.vol.lib.12.tit.8. n.10.Atq; hanc opinionem communem laudat Couar. Sal.Dyn. & alijs refragantibus.

Other conclusions[x] I might adde, but I thought † good to deliuer this one for all, the same in my opinion being more worthie to be remembred, which conclusion is this, that it behooueth the Iudge where hee findeth such clauses derogatorie in any testament, to consider the persons of these testators, namely whether they be such persons as do vnderstand the force and effect of these clauses derogatorie, and reuocatorie, yea, or nay: and to examine the occasions of inserting the same clause; especiallie this is to be considered, whether these clauses be added by the proper motion of the testator himselfe, or at the instigation and perswasion of some other, as the executor, the legatarie, the Notarie[y], &c. For if the testator do vnderstand the effect of such clauses derogatorie, and did insert the same wittingly and willingly of his owne accord, it is presumed that he did so, least peraduenture afterwards he might be solicited and induced by the instigation and importunitie of his kinsfolkes, or the molestation of some other, receiuing small benefite by the testament, and hoping to gaine more by the alteration or reuocation thereof, to chaunge or reuoke the same, contrarie to his former setled purpose, and firme resolution. In which case, if at any time after the testator make a newe testament, the former is not easily reuoked[z], vnlesse in the second he doo make mention and reuocation 19

x)Videant Iustinianistæ.Mantic. de coniec. vlt.vol.lib.12.tit.8.& Couar.in d.Rub.de testa.part.2,n.19.

y)Simo de Prætis.de Interp.vlt.vol.lib.4.fol 227.n.60.&c.

z)Paris.consil.10.lib.3. n.10.11.&c.

cation of the former teſtament, with the clauſe derogatorie[a], in caſes where reuocation is neceſſarie, as in the former concluſions is preſcribed: otherwiſe the ſaid forme not obſerued, it is to be preſumed, that it is not the teſtators meaning to infringe and fruſtrate his former teſtament, made with ſuch conſtant reſolution,
20 and preciſe caution[b]. But on the contrarie, if † the teſtator were but a ſimple perſon, not vnderſtanding the effect of ſuch derogatorie, or reuocatorie clauſes, and the rather if the ſame clauſes were inſerted in the former teſtament by the Notarie, at the petition or by the direction of ſuch as were benefited by the ſame teſtament, or ſome of their friends, being loth to haue the ſame altered or reuoked: then howſoeuer the former teſtamēt be corroborated with cunning or preciſe clauſes, of inſerting the lords praier in the ſecond teſtament, or of not reuoking the former teſtament, although in the ſecond he ſhould ſpecially reuoke the ſame: all theſe cunning clauſes & curious cautions notwithſtanding, the former teſtament may be the more eaſily reuoked, without any ſuch preciſe obſeruation of ſpeciall reuocation aboue deſcribed[c].

a) Simo. de Prætis. de Interp. vlt. vol. lib. 4. fol. 227 n. 61. &c.

b) Simo. de Prætis. vbi ſupra.

c) Idem Simo de Prætis. loco ſuperiùs allegato, vbi locupletiſſimè de hac re. Cui adijcias Didac. Couar. in Rub. de teſta. extra. n. 19. verb. decimotertio. Mantic. de coniect. vlt. vol. lib. 12. tit. 8. n. 15 Barba. conſil. 72. vol. 3. Pariſ. conſil. 10. vol. 3. n. 21. &c.

Thus we haue ſeene in what caſes the former teſtament is infringed or not infringed by the laſt teſtament. If any doo here demaund of
21 me, what † if two ſeuerall teſtaments doo appeare to bee made by one perſon, but it dooth not appeare which is former or later, which of theſe ſhall preuaile. This queſtion is ſatisfied

tisfied a little before[d], thither I referre the reader.

d)Supra eod.part.§.11. & supra,1.part.§.16.n. 17.

Of reuoking the testament made.

1 *Lawfull for euery man to reuoke his testament, and to die intestate.*
2 *Reuocation of a mans testament is not presumed.*
3 *Diuerse extensions of this former conclusion.*
4 *Diuerse limitations of the same conclusion.*
5 *Whether a bare reuocation doo ouerthrowe the testament.*

§.xv.

AN other of those meanes whereby the testamēt which was good at the beginning, is afterwards made void, is reuocation of the same testament. For † as it is lawfull for euery testator to adde and diminish, to and from his testament, and to alter the same: So is it likewise lawfull for euerie person hauing made his testament, to reuoke the same, and to die intestate[a]. 1

But † no man is presumed to haue reuoked his testament once made, vnlesse it be proued[b]: 2
Insomuch † that if a man do liue by the space of fortie yeares, after he haue made his testament, yet is not the testament presumed to be reuoked by the course of so long time[c]. And albeit during the same time his wealth and substance doo greatly increase, yet is not the testament 3

presumed

a)Bald.in L. sancimus. C.de testam.Mantic. de coniect.vlt.vol.lib.2 tit.15.
b)L.eum qui voluntatē.ff.de.pbac.Mascard. Tract.de probac.concl. 1280.qui varijs & ampliac.& limitac.hanc conclus.ornauit.
c)Paul de Castr.Alex. & Ias.in d.L.sancimus. C.de testa. Quære tamen Bart.Sing.183. & Mantic.lib.6.tit.3.n. 46.etiamsi prius fuerit testamentum ad pias causas.

preſumed to be reuoked[d]. And albeit the teſtament be in preiudice of ſuch as otherwiſe were to haue the adminiſtration of the goods of the deceaſed: yet all thoſe things concurring, viz. the long time, the increaſe of the teſtators wealth, and the preiudice of ſuch as are to haue the adminiſtration of the teſtators goods, the teſtament is not preſumed to be reuoked[e]. And albeit the teſtament be made in time of ſickeneſſe and peril of death, when the teſtator doth not hope for life, and afterwards the teſtator recouer his health, yet is not the teſtament reuoked by ſuch recouerie[f]: Or albeit the teſtator make his teſtament by reaſon of ſome great iourney, yet it is not reuoked by the returne of the teſtator[g]. And albeit the teſtator after the making of the teſtament haue a childe borne vnto him, I ſuppoſe that the teſtament is not preſumed thereby to be reuoked[h], eſpecially if the teſtator did liue a long time after the birth of the childe, and might haue reuoked the teſtament, and did not[i].

4 On the † contrarie, the teſtament is ſometimes preſumed to bee reuoked, and the will of the teſtator altered. One caſe is, when he that is appointed executor or legatarie after the making of the teſtament, doth become enemie to the teſtator, or doth him ſome great iniurie[k]. Another caſe is, when the teſtator in heat of anger or diſpleaſure conceiued without iuſt cauſe againſt his ſonne, or other perſons, to whom the

d) Alex. & Iaſ. in d. L. ſancimus.

e) Paul. de Caſtr. Iaſ. & Alex. vbi ſupra.

f) Alex. & Iaſ. in d. L. ſancimus. Maſc. Tract. de probac. concluſ. 1280. n. 17. 18.

g) Dyn. in L. poteſt. de hæred. inſtit. ff. repertorium Bertachini. verb. teſtm. reuocatur. n. 48.

h) Hoc ita ob defectum patriæ poteſtatis. L. quod dicitur. ff. de lib. & poſthu.

i) Mantic. de coniect. vlt. vol. lib. 12. tit. 2. in fin. quamuis inſpecta iuris ciuilis diſpoſitione, contraria opinio approbatur. Graſſ. §. legatum. q. 67. Ripa. in L. ſi vnquam. C. de donac. 42. Maſcard. de probac. concluſ. 1280. n. 153. quæ cõcluſio ampliatur & limitatur per Prat. Tract. reg. & fal. lib. 2. reg. 466. fol. mihi 16. verb. legato.

k) Auth. ſi captiui. C. de epiſcopis & cler. Mantic. de coniect. vlt. vol. lib. 12. tit. 1. n. 34. quod quidem in legatis & fideicommiſſ. quæ nuda voluutate adimi poſſunt, multo facilius admittitur, quàm in hæredis inſtitutione, vt in L. 3. §. vlt. & L. ex parte. ff de adimen. lega. &

Maſcard. de probac. concl. 1280. n. 150. Verum tum dic vt per Bar. in d. L. ex parte. Inſtitutum propter grauiſſ. inimicitias à ſe ortas hæreditatem amittere.

administration of his goods were to be committed, if he had died intestate, making his testamẽt in fauor of others & afterwards (the heat of his displeasure being extinguished) they be reconciled: for by this reconciliation, the testamẽt is presumed to be reuoked[l]. The third case is, when the testator hath begun to make his testament, but is letted or hindered by the executor that he cannot proceed as he would to the finishing of the testament, or further disposing of other legacies: For in this case the will of the testator is presumed to be reuoked[m], cõcerning any benefite which the person so hindering the testator, otherwise ought to haue reaped[n]. The fourth case is, when the testator being extremely sicke, and afraid to die, dooth bequeath some legacie *ad pias causas*, and after dooth recouer his health: for there the legacie is also presumed to be reuoked[o]. It may seeme strange, that legacies left to good and godly vses should bee reuoked, rather then other prophane legacies, but I take the reason to be, for that it is presumed that the testator did not intend to giue legacies to so good an vse in that extremitie, but in case he should die of that sickenesse, and so not dying, the legacie is reuoked[p].

It is † a question appertaining to the reuocation of a testament not altogether free from doubt, whether a testament may be reuoked by a bare and naked reuocation, that is to say, whether the testament bee sufficiently reuoked, when the testator saith, *I reuoke my former testamẽt, or I will that my former testament be of no force?* 5

Many

l) L. filium. de inoff. testõ. Hyero. Franc. in L. quicquid de reg. iur. ff. Mantic. de coniect. vlt. vol. lib. 12. tit. 1. n. 25.

m) L. si scriptis. ff. de his quibus vt indig. Mantic. de coniect. vlt. vol. lib. 12. tit. 1. n. 24.

n) L. 2. ff. si quis aliq. testari prohib. vide quæ inferiùs scripta sunt §. 18.

o) Bar. in rep. L. 1. C. de sacrosanct. eccles. n. 41. Repertor. Bertachin. verb. testm̃ reuocatur. n. 47.

p) Bar. & Bertachin. vbi supra.

Manie writers are of this opinion, that the testament is not reuoked by a bare reuocation before witnesses, vnlesse the testator had added vnto his former words, and saide, *because I will die intestate*[q].

Others are of a contrarie opinion, esteeming that it is sufficient to make a bare reuocation without any expresse mention of dying intestate[r]. And this opinion in my vnderstanding is more sound, and more reasonable: for whiles the testator wil not haue his testament to stand, it followeth that it is his will and meaning to die intestate[s], and so the next of kin to be called to the administration of his goods. Besides it seemeth absurd and vnreasonable to maintaine a testament, not onely without a mans will, but euen against his will[t], at least within this realme of England, where we doo not obserue the solemnities of the ciuill law: this opinion is to be preferred; for euen by the ciuil law, legacies are taken away by a simple and naked reuocation[u]: and so bee diuerse testaments; those I meane wherein those solemnities are not necessarie, as testamẽts *ad pias causas*[x], or amongst the testators children[y], or militarie testaments[z]: wherefore as those testaments are reclaimed and made void by a bare reuocation, so ought our testaments to be measured with the same line, and to enioy like libertie, aswell in the dissolution, as in the constitution[a].

q) Bar. in L. si iure. ff. de leg 3. Alex. & alij, in L. sancimus. C. de testa. quorum opinio multorum testimonio communis est. Dec. consil. 582. Clar. §. testm. q 91 Graff. §. testm q. 84. Simo de Prætis de Interp. vlt. vol. li. 4. fo. 226 Vasq. de succes. ci ea. lib. 2. §. 15. requisit. 17. n. 62. vbi sic, sicut (inquit) si vas aureum, vel argẽteum, vel luteum feceris, deinde iusseris illud infectum fieri, non per hoc infectum fiet, nisi man' adhibeas, illúdq; fregeris: ita quoque testm. &c. Sed Bar. alia ratione nititur, quia vz ex hac voluntate non potest adiri hæreditas.

r) Bald. in L. sancimus. C. de testa. Socin. Iun. consil. 145. asserens hãc sententiam pluribus, & maioris ponderis auctoritatibus confirmatã. Quinimo narrat eandẽ cuilibet sensato & rationabili intellectui quadrare, & quemlibet Iudicem posse ab opinione Bar. recedere: cum quo etiã conuenit Mantic. de coniect. vlt. vol. lib. 12. tit. 15 Item Gid. papa q. 200. Barba. cõsil. 60. vol 2. & Raph. Cuma. in d.

L. si iure, non dubitans pronunciare considerationem Bartoli esse Truffam. (s) Alex. cõsil. 104. vol. 2. (t) Mantic. d. lib. 2. tit. 15. n. 22. (v) L. 3. ff. de alimen. leg. (x) Alex post Bald. d. consil. 104. (y) Alex. eod. consil. 104. (z) Vasq. de succes. resoluc. lib. 1. §. 9. n. 7. (a) Cõsulas Vasq. d. n. 7. vbi testm militare eã ob causam nuda voluntate posse dissolui contendit, quia nuda voluntate potest cõstitui per L. nihil tã naturale. de reg. iur. ff. Cõsulas etiã de hac re Masc. de pbac. concl. 1282. n. 36. q̃ has dissidẽtes op. distinctiones fædere cõciliare conat' est

Of cancelling the testament.

1 *A mans minde is knowen as well by deedes as by wordes.*
2 *Of the effect of cancelling testaments.*
3 *Whether a nuncupatiue testament leaſe his force by cancelling the writing.*
4 *Diuerſe caſes wherein the testament is not hurt by cancellation.*
5 *If it bee vnknowne who did cancell the ſame, to whom is the ſame to be attributed.*

§. xvj.

AN other of the meanes whereby the testament which was good at the beginning, is afterwards made voide, is the cancelling or cutting of the testament[a], for the † will and meaning of a man is no 1
leſſe ſhewed by his deedes thē by his woords[b]: And therefore hee that cancelleth or defaceth his testament, is thereby thought to haue this will and meaning, to take away the force and vertue thereof[c]: which will in this reſpect ought to bee obſerued for a lawe, and ſo the testament cancelled and defaced, is to bee adiudged void[d].

And † that this cancelling or defacing of 2
the testament being obiected[e], doth deſtroy the force thereof, is ſuppoſed to bee extended to thoſe testamentes Nuncupatiue, which afterwards be reduced to writing[f]: ſo that † if a man 3
first

a) Cācellare eſt in modum crucis expungere vel illinire. Bar. in L. 1. § ſed conſulto. ff. de his quæ teſtō. del. Spiegel. Lexic. verb. cancellare.
b) Minſing. in §. ex eo. Inſtit. quib. mod. teſta. infir. Vaſq. de ſucceſſ. crea. lib. 2. requiſ. 17. n. 62.
c) L. 1. & L. proximè. ff. de his quæ teſta. del. & DD. ibid. Vaſ. de ſucceſ. crea. §. 15. requiſit. 17. n. 60. 61. &c.
d) Intellige ope exceptionis, non ipſo iure. gloſſ. in L. 1. ff. de his quæ teſtō. del. quæ op. eſt com. Graſſ. Theſau. com. op. q. 85. n. 1.
e) Aliàs ipſo iure nō viciat. d. gloſſ. communiter recepta.
f) Paul. de Caſtr. in L. fin. ff. de his quę teſt. del

firſt make his teſtament by word of mouth, then cauſeth the ſame to be written, and afterwards doth wittingly and willingly cancell or cut the ſame writing, or otherwiſe deface it, that then ſuch teſtamẽt is void, as if it had bene written at the beginning[g]: neither doth it profite to proue the ſame by witneſſe[h], for although the inſtrument or writing doo not appertaine to the ſubſtance of the teſtament: yet by the cancelling thereof, the teſtator is preſumed to haue repented of the making thereof, and to haue reclaimed or reuoked the ſame[i]. Furthermore, albeit there appeare no cauſe of vnworthineſſe either in the executor, or any other legatarie, whereby the teſtator might be mooued to diſappoint thẽ of their hope; yet by cancelling the teſtament, the whole teſtament ſhall be voide[k]: And the teſtator is preſumed to haue done it in their fauour, who are to haue the adminiſtration of his goods after he dieth inteſtate[l].

4 The caſes † wherein this former concluſion, (viz. that by cancellling or defacing the teſtament, the ſame is made voide) dooth faile, are theſe.

The firſt is, where the teſtament was cancelled by the teſtator himſelfe vnaduiſedly, or by ſome other perſon without the teſtators conſent, or by ſome other caſualtie[m].

The ſecond caſe is, when the teſtator after he haue wittingly and willingly pulled away the ſeales, doth ſeale the ſame againe[n].

The third caſe is, when the whole teſtament is not cancelled or defaced, but ſome part ther-

g) Zaſ. conſil. 2. vol. 1. n. 29. Graſſ. Theſaur. coop. §. teſtm̃. q. 85. vbi hãc ſententiam & veriorẽ, & humaniorem refert, & huic etiam ſententiæ ſubſcripſit Vaſquius de ſucceſſ. crea. lib. 2. §. 15. requiſ. 17. n. 61. 62. quicquid in contrarium ſtatuat Iul. Cla. §. teſtm̃ q 93. vel Minſinger. in §. pen. Inſtit. quib. mod. teſta. infir. vel ante eos Bald. in d. L. fin. vel poſt eos Maſcard. de proba. concluſ. 1282. n. 31.

h) Vaſq. d. requiſit. 17. n. 63.

i) Vaſq. & Graſſ. vbi ſupra.

k) Vaſq. de ſucceſſ. reſoluc. lib. 1 §. 4. in prin. Doctores in L. cancellauerat. & in L. proximè. ff. de his quæ teſta. del.

l) Dyn. & DD communiter. in L. noſtram. ff de his quæ teſtõ. del. Mantic. de coniect. vlt. vol. lib. 12. tit. 1. n. 31. Clar. §. teſtm̃. q. 93 Graſſ. §. teſtm̃. q. 85.

m) L. 1. §. ſed conſulto. ff. de his quæ teſtõ. del. Bar. in L. ſi iure. de leg. 3. Angel. Are. & Minſing. in §. ex co. Inſtit. quib. mod. teſta. infir.

n) L. ſi teſtamentum. ff. qui teſta. fac. poſſ.

of onely raced, blotted, or put out, for the other parts of the testament doo remaine firme and safe[o], as they were before, although the deletion were in the chiefe part of the testament, namely the assignation of the executor[p].

The fourth case is, when there be seuerall papers or writings of one tenure, each of them conteining the whole testament, the defacing or cancelling of some of them dooth not hurt the testament[q], vnlesse it be proued that the testators mind was contrarie[r].

The fift case is, when the testament is lost, either in the life time of the testator, or after, for so much as may be prooued by witnesses, is still in force[s].

What † if the testament be found cancelled and defaced, but it is not knowen who did cancell it or deface it, to whom is this acte of cancelling or defacing the testament to be attributed, to the testator which made it, or to some other, which otherwise peraduenture might be hindered by it. 5

It seemeth not to be reputed the act of the testator[t], for mutation or change of the minde is not to be presumed[v], especially after a man hath done a thing with such deliberation and resolution, wherewith testaments commonly are made and finished[x].

On the contrarie, it seemeth that it ought not to be accounted the act of any other[y]; for that were to presume fraud and deceite in men which ought not to be presumed, vnlesse it be proued[z].

In

o) L. proximè. §. fœtia ff. de his quæ in testō. del. Mantic. de coniect. vlt. vol. lib. 12. tit. 1. n. 31. infin.

p) Wesenb. in d. tit. de his quæ in testō. del ff. Mantic. vbi supra.

q) L. pluribus. ff. de his quæ in testato. del.

r) d. L. pluribus. & ibi Doctores.

s) L. 1. § sed consulto. ff. de his quæ in testato. del. cum gloss. ibid.

t) Zas. consil. 2. lib. 1.

v) L. eum qui. ff. de probac.

x) Supr. 1. part. §. 3. verb sententia. & hac ipsa parte paulò superiùs, viz. § 13.

y) Io. Faber. in §. ex eo. Instit. quib. mod. testa. infir. Reckius. de testa. coniug. lib. 1 c. 46. n. 1.

z) L. dolum. C. de dolo

In this controuerſie therefore I ſuppoſe that the perſon in whoſe cuſtodie the teſtament is found ſo cancelled or defaced, is to be adiudged to haue done the acte, whether it be the teſtator or another [a].

And if it be ſo that the teſtament were kept in ſuch a place, as not onely the teſtator, but others might haue acceſſe vnto it: In this caſe the arguments and circumſtances of the fact being equall and indifferent, the cancelling or defacing of the teſtament, is rather to be aſcribed to the teſtator then to others [b], who is alſo preſumed to haue done the ſame wittingly and willingly [c]: ſauing in legacies of freedom, or *ad pias cauſas*, which being blotted or put foorth by the teſtator, it is not preſumed to haue beene done willingly [d]. But when the arguments and circumſtances be vnequall, and the greater preſumptions that it ſhould be the acte of another rather then of the teſtator, it is to be adiudged accordiugly [e]: for the fewer and weaker preſumptions giue place to the more & ſtronger [f].

a) DD. in L. ſi vnus. C de teſta. Mantic. de cõiect. vlt. vol. lib. 12. tit. 1. n. 20.

b) Zaſ. d. conſil. 2. vol. 1. n. 1. & n. 15. Faber. in §. ex eo. Inſtit. quib. mod. teſta. infir.

c) Paul. de Caſtr. in L. 1. §. ſed conſulto. ff. de his quæ in teſtõ. del.

d) Paul. de Caſtro. in d. §. Tiraquel. de pia cauſa. priuileg. 16. Mãtic. de coniect. vlt. vol. lib. 12. tit. 2. n. 25.

e) Zaſ. d. conſil. 2. n. 15. 16. 17. 18. &c.

f) c. afferte mihi gladiũ de præſump. extr. Mãtic. de coniect. vlt. vol. lib. 12. tit. 17. & Zaſ. vbi ſupra.

Of the alteration of the ſtate of the teſtator.

1 *What maner alteration of the ſtate of the teſtator doth make voide his teſtament.*

2 *Two times whercin the teſtator muſt haue power to make a teſtament.*

§. xvij.

THe alteration † of the state of the testator, is also a meane whereby the testament which was good at the beginning, doth after become voide [a]; the which alteration may happen diuerse waies [b], but especially when the testator is conuicted or condemned of such a crime, after the making of his testament, for the which the law depriueth him of this power and abilitie of making a testament [c]. 1

What maner of crimes they be, whereby the state of the testator is so altered, that thereby he is made intestable, is aboue expressed [d], to wit heresie, apostasie, treason, felonie, sodomie, incest, manifest vsurie, and such like: whereunto also I might adde captiuitie [e], not for that captiuitie is a crime, but for that it hath the same effect with those crimes, to ouerthrowe the testament. But if the captiue recouer his former libertie, then the testament made before the captiuitie recouereth his former force [f]. And if he that is conuicted or attainted of treason, or felonie, obtaine the princes pardon, with restitution to his former state, then the testament made before such his conuiction is likewise reuiued and restored [g]; and in both cases the testament is good, without any newe confirmation or declaration [h]. Howbeit in this they differ; for the testament of the person which recouereth his former libertie, is good euen from the

a) §. alio Instit. quibus modis testa. infir.

b) Videlicet, maxima & media capitis diminutione. gloss. in d. §. alio. Item voluntariè & inuitè. Minsing. in §. nō tamen. Instit. eod. tit.

c) d. §. alio. & ibi gloss. & DD.

d) De quib⁹ sigillatim. supra part. 2. & part. 5.

e) L. eius qui apud hostes. ff de testa. supr. part. 2. §. 8.

f) §. non tamen Instit. quib. mod. testa. infir.

g) L. si quis §. quaten⁹. ff. de inust. testam.

h) Quod verum quidē est in capitis diminutione necessaria, secùs in voluntaria. Minsing. & Platea. in d. §. non tamen.

the beginning, as if he had neuer beene in captiuitie[i]: but his teſtament whoſe crime is pardoned, and himſelf reſtored, is of force onely from the time of reſtitution[k]. Againe, if the pardon doo onely import a remiſſion of the penaltie, without reſtitution of his former eſtate, then the teſtament before made dooth ſtill remaine voide[l].

i) Graff. Theſaur. com. op. §. teſtm. q. 25.

k) Ioh. Plater. in d. §. nō tamen.

l) Minſinger. in d. §. non tamen.

2 And here note † that there be two times wherein it is neceſſarie, that there be in the perſon of the teſtator abilitie to make a will, the one is, *the time of the making of the teſtament*, when it receiueth his ſubſtance or being: the other is, *the time of the death of the teſtator*[m], when it receiueth his ſtrength and efficacie (as for the time betwixt the making of the teſtament, and the death of the teſtator, it skilleth not whether the teſtator haue any ſuch power or not[n]:) and therefore if any perſon being attainted of ſome crime, doo whileſt he is inteſtable make his teſtament, and afterwards obtaine a full pardon, with full reſtitution, the teſtament neuertheleſſe is voide, becauſe of the originall defect[o].

m) d. § non tamen. L. 1. § exigit. de bon. poſſ. ſecundum Tab. infr. §. 19. Porcius. in §. in extraneis. Inſtitut. de hæred. qual. & differ.

n) d. §. non tamen. & Minſing. ac alij ibid.

o) Aretin. in d. §. non tamen. Simo de Prętis. de Interp. vlt. vol. lib. 1. fol. 146. n. 56.

Of forbidding or hindering the teſtator to make an other teſtament.

1 *The former teſtament is voide, where the teſtator is forbidden to alter the ſame, or to make a new teſtament.*

2 *Diuerſe extenſions of this foreſaid concluſion.*

3 *Of hindering the Notarie or witneſſes to haue acceſſe*

ceſſe to the teſtator.

4 *Of diſturbing the teſtator by making a noiſe.*

5 *Of immodeſt perſwaſions.*

6 *Whether this prohibition be proued by the aſſertion of the teſtator.*

7 *Diuers limitations of the firſt concluſion, viz. that the teſtament is ouerthrowen, where the teſtator is hindered in altering the ſame.*

8 *Of diſturbing the teſtator with noiſe and weeping.*

9 *Whether the prohibition of one bee preiudiciall to others.*

§. xviij.

Amongſt many other meanes wherby the teſtamēt which was good at the beginning, is afterwards made void, this is one not to be omitted, (ſeeing it is ſo oftē practiſed) namely when† the teſtator intending to alter the teſtament before made, or to make a new teſtament is forbidden or croſſed, ſo that he cannot or dare not doo as hee intended[a]. By this prohibition and maner of crooked dealing, the teſtament which ſhould haue beene altered is made voide[b].

The reaſon is, becauſe as thoſe teſtaments are not ſound at the beginning which are made by feare or fraude[c]: ſo that teſtament which for feare, or by fraude the teſtator dare not, or cannot alter, is from henceforth infected with the ſame diſeaſe, and ſo from henceforth to be eſteemed

a) Tit. ſi quis aliquē teſtari prohib. ff. & C.

b) L. 1. & 2. ff. ſi quis aliquem teſtari prohib. Roſſ. Tract. de var. crim. Tit. de his qui aliq. teſtari phib. Menoch. de arb. iud quæſt. caſ. 395. Socin. Iun. conſil. 148. vol. 2. qui omnes locupletiſſimè ſcripſerunt de hac re. Eos igitur videas velim.

c) Supr. eod. part. §§ 2. & 3.

eſteemed of no more force or efficacie then theſe other[d].

d) Weſenb. in tit. ſi quis aliq. &c. ff. n. 1.

2 This concluſion, † that the teſtament doth become voide, when the teſtator is prohibited to alter the ſame, doth proceed not onely when the teſtator himſelfe is prohibited or put in

3 feare: but alſo when the † Notarie or witneſſes be letted or ſtopped, that they cannot haue acceſſe vnto the teſtator[e]: for he that dooth not permit, is ſaid to prohibite[f]. And therefore if the wife being made executrix, or any other perſon benefited by the teſtament, vnderſtanding that the teſtator is about to alter his will, will not ſuffer his friends to come vnto him, pretending peraduenture that hee is faſt aſleepe, or in a ſlumber, or the Phiſition gaue in charge, that none ſhould come to him[g], or pretending ſome other excuſe, (or els all excuſes ſet apart, do for charities ſake ſhut them forth of the doores[h]:) In theſe caſes the teſtament is void, in deteſtation of ſuch odious ſhiftes and practiſes[i].

e) Bar. in L. fin. ff ſi quis aliquem teſtari prohib. Boſſ. in d. tit. de his qui prohib. &c. n. 2. Pariſ. conſ. 67. lib. 3.

f) Pariſ. d. conſil. n. 13.

g) Peckius. Tract. de teſta. coniug. lib. 1. c. 13

h) Vt eſt apud Teren. præ amore excluſit eum foras.

i) Peckius vbi ſupra.

4 Secondly, this concluſion hath place, if † after the comming of the Notarie or witneſſes, & preparation of all things neceſſarie for the alteration of the former teſtament, ſome perſon of intent and purpoſe to hinder the altering of the ſame will, doth make a noiſe, and keepeth ſuch a ſturre, exclaiming and quarrelling with ſuch as ſeeke to haue the teſtament altered, that the teſtator being therewith diſturbed and offended, did not then alter his will, and ſhortly after died[g].

g) Anch. conſil. 337. Menoch. de Arbitr. Iud. cal. 395 n. 38. 39.

Thirdly,

Thirdly†, this conclusion hath place not only where the testator is prohibited by threatnings, or hindered by fraude, but also when he is ouercome with importunate requests, and fraudulent perswasions, not to alter his former testament[h]. 5

Fourthly†, this conclusion doth proceed, albeit there bee no stronger proofe of violence, or impediment offered to the testator in this case, then the assertion of the testator himselfe[i]. 6

In these cases following†, the former conclusion doth not proceede. The first case is, when the testator had no purpose to alter his testament: for if any doo forbid the testator to alter his testament, when the testator hath not anie purpose to alter the same; this prohibition dooth not hurt the force of the testament alreadie made[k]. The second case is, when the feare which is vsed in the prohibition is vaine, or but light, such (I meane) as cannot moue a constant person[l]. The third case is when the testator is prohibited, but not at that present time, when he intended to alter his former testament, for such prohibition is not hurtfull[m]. The fourth case being like to the former, is when the testator after the prohibition might verie well at sundrie times haue altred his testament, and did not[n]: for in not altering the testament when he might, he seemeth to allowe it and confirme it[o]. The fift case is, when the testator is not compelled by feare, nor circumuented by fraud, but induced with flattering speeches voide of deceite, 7

h) Afflict. decis. 69. n. 7. Menoch. d. cas. 95. n. 41. huc pertinet quod scripserunt Inno. in c. petitio. de iureiur. extr. & Rebuff. Tract. de rescript. tom. 2. art. 2. gloss. 3.

i) Paris. consil. 66. n. 119 vol. 3. Socin. Iun. consil 148. n. 14. Menoch. d. cas. 395. n. 40.

k) L. 1. ff. si quis aliquẽ. Bar. in L. vlt. eod. tit. n. 13. Menoch. d. cas. 395. n. 31. & est co. op. quod duo sunt probanda, vz. voluntas mutandi testm̃. & prohibitio. Socin. Iun. cõsil. 148. vol. 2.

l) Paris consil. 97. n 41. vol. 3. Menoch. d. cas. 395. n. 32. & nos diximus supr. ead. part. §. 2

m) Socin. sen. cõcil. 105 vol. 3. Socin. Iun. consil 148. n. 3. vol. 2. Paris. consil. 67. n. 33. vol. 3. Menoch. d. cas. 395. n. 32. Bossi d. tit. de his qui prohib. &c. n. 2. in fin.

n) Mar. Socin. Iun. consil. 148. n. 48. vol. 2. Paris. consil 67. n. 62. vol. 3. Menoch. d. cas 395. n. 25.

o) Mascard. de probac. conclus. 1290. n. 54. Mantic. de coniect. vlt. vol. lib. 12. tit. 1. n. 12. per L. tractabatur. ff. de testa. mil. quod tamen serio considerandum est, vt per Mãtic. vbi supr. & Peckius Tract. de testa. coniug. lib. 1. c. 11.

ceite, (such as may become an honest wife, or faithfull friend) not to alter his testament[p]. The
8 sixt case is, when † all things necessarie for the alteration of a testament being prepared, the executor or legatarie, or other person, with his noise or weeping, dooth disturbe the testator that he cannot alter his testament, not of purpose to hinder such alteratiõ, but being moued with compassion, to see the testator grieuously afflicted with sicknes, or being stricken with an vnfeigned sorrowe, through feare of the testators death, or otherwise ouercome with an honest or kinde care or griefe, and not able to suppresse the force of this vehement passion; dooth burst into teares, and so with noise of his lamentations dooth disturbe the testator, that he cannot proceed in the alteration of his will: In this case the former testament is not made frustrate by such disturbance, albeit after that, the testator neuer had the like opportunitie of altering his testament[q]. Howbeit the iudge must be verie wary, and learne by the circumstances of the fact, whether this noise and exclamation be of
9 policie, or of simplicitie[r]. The seuenth † case is, when the executor or legatarie dooth forbid or hinder the testator to alter his testament, in which case the former testament is voide, onely in preiudice of that person, which doth prohibite or hinder the testator to alter the same, but not in preiudice of another not cõsenting therunto[s]: much lesse doth the prohibition of that person, who is to reape no benefite by the testament, hurt those executors which otherwise should

p) Menoch.d.cas.395.n 42. per L.vlt.ff.si quis aliquem testari phib.

q) Paris.consil.67.vol 3.n.47.48.Socin.Iun. consil.148.vol.2.n.33. verb.nam dum primo. &c.

r) Menoch.d.cas.395. n.39.

s) L.2.si quis aliquem testa.prohib.ff.

should be administrators, in case the partie died intestate[t], vnlesse it doth appeare that the testator would haue chaunged his whole testament, and haue appointed newe executors, for then this prohibition maketh voide the whole testament, like as if the testator had beene compelled to make the same at the first[v].

t) Menoch. d. cas. 395. n. 20. post Bar. in L. vltim. si quis aliquem testari prohib. ff n. 11.

v) Bar. in d. L. vlt. Menoch. d. cas. 395. n. 17. Paris. consil. 67. vol. 3.

There is much adoo in the ciuill lawe about this question, who ought to haue the testators goods, when hee is compelled to make his testament, or hindered that hee can not reuoke his testament, the prince or the heires of the deade person[x]? But with vs if any die intestate, the administration of his goodes is to bee committed to the widow, or next of kinne[y], and doth not go to the prince though the executor or legatarie be vnworthie.

x) De qua q. Menoch. de arb. iud. cas. 395.

y) Stat. H. 8. an. 21. c. 5.

When he that is made executor can not, or will not be executor.

1 *Though the executor be incapable, the legacies are still due.*

2 *The executor ought to be capable of the executorship at three seuerall times.*

3 *It is sufficient for the legatarie, if he be capable of the legacie at the testators death.*

4 *What if the disposition be conditionall.*

§.xix.

1 ALbeit † where he that is named executor in the teſtament, either cannot or will not be executor, by the lawes of this realme the legacies bequeathed in the ſame will are ſtill due, and to bee paied by ſuch as ſhall haue the adminiſtration of the goodes of the deceaſed[a]: in which caſe the will is to bee annexed to the letters of adminiſtration (as heretofore I haue declared[b]) yet by reaſon of the incapacitie or refuſall of the executor, ſuch diſpoſition is thereby depriued, both of the name and nature of the teſtament[c], and ſo the partie is ſaid to die inteſtate.

I ſhall not neede to repeate here particularly, by what means the executor may become incapable of the executorſhip.

This one thing I thought good to note in
2 this place, that by the ciuill lawe † hee which is named executor, muſt be capable of the executorſhip at three ſeuerall times[d]: Firſt at the *making of the teſtament*, for then the teſtamẽt taketh his ſubſtance or being[e]. Secondly, at the time *of the death of the teſtator*, for then the teſtament receiueth his ſtrength & confirmation[f]. Thirdly, at the time of *the probation of the will, and vndertaking the executorſhip*, for then the teſtament entereth to his effect and execution[g]. Howbeit
3 it is † ſufficient in a legatarie, if he be capable of the legacie or deuice at the time of the death of the teſtator[h], vnleſſe the deuiſe be not pure and ſimple,

a) Brook Abridg. tit. executor. n. 20. dixi iure huius regni, nàm ſecus eſt iure ciuili, hæreditate non adita. L. 1. in fin. de iniuſto teſtõ. L. fideicommiſſum. de leg. 1. L. imperator. de leg. 2 ff. L. hoc non ſit indiſtinctè verum, vt per Vigelij method. iuris ciuil. à quo tradita eſt regula cum plurimis limitationibus & ſublimitac. lib. 12. c. 9.

b) Supr. part. 1. §. 6. n. 6.

c) Inſtit. tit. de hæredit. quæ ab inteſtat. def. in princ. Brook vbi ſupra.

d) §. in extraneis. Inſtit. de hæred. qual. & differentia. vide ſupra part. 5. §. 2. & quæ in illo §. adnotaui.

e) Chriſt. Porcus. in d. § in extraneis.

f) Idem Porcus. in eod. §.

g) Idem ibid. quamuis Iaſ. hiſce rationibus, totus non acquieſcat, quippe qui alias meliores, atque (vt ille inquit) fundamentaliores aſſignat, in ſuis addic. ad Chriſt. Porcum. in d §.

h) Bar. in L. ſi alienũ. §. 1. ff de hæred. inſtit. in fin. Peckius. Tract. de teſtam. coniug. lib. 4. c. 31. n. 5. Graſſ. Theſaur. com. op. §. Inſtitutio. q. 28. n. 4.

simple, but conditionall: for in conditionall dispositions both the executor, and also the legatarie, must be capable at the time of the performance or existence of the condition[i]; as for any other time, whether it bee betwixt the making of the will, and the testators death, or betwixt his death and the probation of the will, it skilleth not. for though the executor be thē incapable, it hurteth not[k], especially if †the disposition be conditionall; for then it is not required in the executor (much lesse in the legatarie) that he be capable at another time, sauing onely at the time of existence or performance of the condition, no not at the making of the will, or death of the testator[l]. 4

If the executor doo refuse to vndergo the burthen or office of an executor, then he looseth whatsoeuer legacie is left vnto him in the testament[m], sauing as elsewhere is recited[n].

i) Bar. Grass. & Peckius vbi supra.

k) §. in extraneis. Instit. de hæred. qual. & differentia.

l) Alex. in L. 2. ff. de vulg. & pup. sub. n. 11. Grass. d. §. Institutio. q. 28. n. 3. quæ op. com. est Licèt non desint qui contrariam teneant.

m) Bar. & Sichar. in L. si legatarius. C. de legatis.

n) Supra part. 6. §. 3.

Of ademption of legacies.

1 *By what meanes legacies become voide.*
2 *Ademption of legacies what it is.*
3 *Ademption of legacies two fold.*
4 *The testator may at any time alter his will, either wholy, or in part.*
5 *Ademption of legacies not to be presumed.*
6 *Corne in the barne being bequeathed, whether the same being spent, and other corne there at the death of the testator, the legacie be extinguished.*
7 *Whether the ship bequeathed, being altered and renewed, the legacie be extinguished.*

8 *Whe-*

8 *Whether the house bequeathed, being by peecemeale reedified and renued, may be recouered.*

9 *What if the testator do voluntarily pull downe the house, and erect another in place thereof.*

10 *What if the house bee burned, or blowen downe, and another erected, whether may this newe house be recouered.*

11 *An answere to an obiection.*

12 *Whether by necessarie alienation of the thing bequeathed, the legacie be adempted.*

13 *What if the alienation be voluntarie, the legacie is extinguished.*

14 *What if the voluntarie alienation bee voide in lawe.*

15 *What if the testator should redeeme the thing alienated.*

16 *Whether lands deuised, alienated, and redeemed, may be recouered.*

17 *The reasons of either lawe being contrarie in this point.*

18 *If the thing bequeathed be pledged, it is not thereby adempted.*

19 *Whether the receiuing of the debt bequeathed by the testator, be an ademption of the legacie.*

20 *A flocke of sheepe being bequeathed, whereof one alone is left, whether that one be due.*

§. xx.

1 MAny other † meanes there be, whereby the testament which was good at the beginning, becommeth void afterwards[a]: but it were too long

a) Centum penè casus quib⁹ resoluitur testm. commemorat Vasq. de succeſſ. resoluc. lib. 1.

to rehearse them all: let it suffice therefore, that I haue spoken of such as happely may the ofter fall out in fact. Now it remaineth that I speake of such meanes, whereby legacies giuen and bequeathed by the testator become voide: Of which meanes some *do proceede from the fact of the testator*[b]: some haue relation to *the fact or person of the legatarie*[c]: some to *the thing bequeathed*[d].

In respect *of the fact of the testator* are legacies made voide, especially by *ademption*, and by *translation* of the thing bequeathed[e].

Ademption† is a taking away of the legacie before bequeathed[f]: *Translation* is a bestowing of the legacy bequeathed vpon some other person[g]. Ademption may be without translation, but translation of a legacie cannot be without ademption[h]. 2

Ademption† of legacies is two folde, *expressed* and *secrete*: *expressed*, when the testator doth by words take away the legacie before giuen[k]: *secrete*, when the testator doth by deedes without words take away the legacie: as whē he doth giue away the thing bequeathed, or doth voluntarily alienate the same before his death[l]. 3

It is † lawfull for euery testator[m] so long as he liueth, to reuoke or alter his will[n], either wholy or in part[o], either in the same will, or in another, either solemne or vnsolemne[p], simplie, or conditionally[q]. 4

When the testator dooth *expresly* reuoke the legacie, it is not materiall whether he doo vse wordes direct contrarie: as *I doo not giue*, *I do not bequeath*, or any other words whatsoeuer, so

b) Hoc ipso §. & §. seq.
c) Infra §§. 22. & 23.
d) Infra §. vlt.
e) Instit. tit. de adem. & translac. legatorū & tit. de adimen. vel transferend. leg. ff.
f) DD. in d. Rub. de ademp. & translac. leg. Instit.
g) Minsing. in d. Rub.
h) Minsing. vbi supra. Wesenb. in tit. de adimen. vel tranfferend. leg. ff.
i) Wesenb. in d. tit. de adimen. leg. ff.
k) L. 2. & 3. de adimen. leg. ff.
l) L. rem legatam. de adimen. leg. ff.
m) L. 3. de re. iud. L. 3. de reg. iur. ff.
n) L. 4. ff de adimen. leg. ff.
o) L. vlt. de adimen. leg. ff.
p) Quod si alio testamento insolenni fiat ademptio, tunc non ipso iure, sed ope exceptionis tollitur legatum. Graff. Thesau. com. d. §. legatum. q. 78.
q) L. datum. C. de legatis.

ſo that his meaning may appeare[r].

r)L.2.& 3.ff. de adimē. leg.Inſti.tit. de adem. legat.

5 Ademption † of legacies is no more to be preſumed, then the reuocation of the teſtaments[s] vnleſſe it be prooued[t]. And therefore † if 6 the teſtator doo bequeath all the corne in his barne, and after the making of his will, the teſtator ſuruiueth vntil all the corne be ſpent, and other corne put in the pleace thereof[u]: this ſpending of the corne is no ademption of the legacie; and therefore the legatarie ſhall haue ſuch corne as is founde in the barne when the teſtator dieth[x], vnleſſe the corne found in the barne at the death of the teſtator, bee greater in quantitie then was the corne at the time of the will making: for ſo much is due, but not a greater quantitie then was the firſt[y].

s)Bald.in L.ſi pluribus ff.de leg.1.Mantic.de coniect.vlt.vol.lib.12. tit.2.n.2.

t)L.eum qui voluntatē. ff.de probac.

v)Secus ſi non ſit repoſitum per modum ſurrogationis, ait Angel. in L.ſi ſeruus.§.qui quinque.ff.de leg.1. Maſcard.de probac. concluſ.1283.n.33.

x)Bar.in d.§. qui quinque.Mantic.de coniect.vlt.vol.lib.12.tit. 2. n.9.

y)Paul.de Caſtr.in d. §.qui quinque.Maſcard.de probac.d.cōcl. 1283.n.33.34.

Likewiſe if † the teſtator do bequeath a ſhip, 7 and afterwardes dooth by peecemeale repaire and renue the ſame, ſo that there remaineth nothing of the olde ſhippe but onely the bottome tree: here is no ademption of the legacie, and therefore the legatarie may recouer the whole ſhippe[z].

z)L.quod in rerum. §. & ſi nauem.ff. de leg.1. Spiegel.Lexic.verb. carina.Mantic.de coniect.vlt.vol.lib.12.tit.2. n.7.

8 Or if the † teſtator doo bequeath a houſe, and afterwards by peecemeale repaire the ſame, ſo that there is no parte of the olde matter or ſtuffe remaining, the will of the teſtator is not hereby preſumed to be chaunged, and therfore the legatarie may recouer the houſe ſo repaired[a]: For it is deemed to bee the ſame houſe ſtill in lawe, as in the former caſe it is deemed to be the ſame ſhip[b].

a)L.ſi ita legatum.§.ſi domus.ff.de leg.1.
b)Iaſ.in d.§.ſi domus. n.1.Maſcard.de probac. concluſ.1280.n.21.Zaſ. in d.§.& ſi nauem.

9 But if the † teſtator did at once voluntarily

pull downe all the whole houſe bequeathed, & did afterwards erect anew houſe in the ſame place; then by the ciuill lawe, the will of the teſtator is preſumed to be changed, and the legacie extinguiſhed[c]. And although by the lawes of this realme, it may be otherwiſe in contracts and couenants amongſt ſuch as be liuing[d]: admit it were ſo (as in ſome ſort it is anſwerable to the ciuil law[e]) yet the reaſon of the difference is not obſcure, which is this. In cõtracts, couenãts, and graunts made amongſt ſuch as be liuing, he to whom this or that is lawfully graunted, hath by and by a certaine right and intereſt therein[f], which without his conſent ought not to bee impaired[g], and whatſoeuer is builded vpon anothers ground, yeeldeth thereunto, and thereby becommeth his, which is the owner of the ground[h]. But in a teſtament or laſt will, there is no ſuch right deriued to the legatarie, in, or to the thing bequeathed, vntill the teſtator bee dead[i]: and therefore, if in the meane time the teſtator do alter his minde (which alteration is manifeſt, as well by deeds as by words[k]:) In this caſe the legatarie which hath no right, cannot make ſuch claime to the thing bequeathed as another may doo, to whom a thing is couenanted or graunted, and ſo hath a right and intereſt therein[l]. In deed if the teſtator were deade, and ſo a right in the legatarie, and then the heire or executor ſhould pull downe the houſe deuiſed, and erect a new houſe in the ſame place, the legatarie might recouer the newe builded houſe[m]: but being pulled downe by the teſtator,

c) Paul. de Caſtr. in d. § ſi domus. Mantic. de coniect. vlt. vol. lib. 12. tit. 2. n. 6.

d) Id quod non ſemel mihi nunciatum fuit.

e) Intellige quoad iura realia quorum intuitu ædificiũ deſtructum & reſtitutum cenſetur idem. L. ſeruitutes. §. ſublatum. ff. de ſeruit. verb. præd.

f) Bar. & alij. in d. §. vlt.

g) L. Id quod noſtrum. de reg. iur. ff.

h) §. cum in ſuo ſolo. Inſtit. de rerum diuiſ.

i) Bar. in d. L. ſi ita legatum. §. vlt. de leg. 1. verb dic ergo.

k) L. Paulus. ff. rem rat. haberi. Weſenb. in tit. de adimen. leg. ff. n. 2. & 4.

l) Bar. in d. §. vlt. & Iaſ. ibid. n. 6.

m) L. domos. de leg. 1. ff. & ibi DD.

tor, whiles as yet there was no right or intereſt in the legatarie, the legacie is extinguiſhed[n], as is aforeſaid: vnles a contrarie meaning be proued in the teſtator, viz. that he did not intend to reuoke the deuiſe, by deſtroying the thing deuiſed[o], becauſe peraduenture he did proteſt[p] before he cauſed the houſe to be pulled downe, that hee did not thereby meane to make voide the deuiſe, or after the reedifiyng thereof, did ratifie and confirme his former will[q], or did manifeſt his meaning by other equiualent coniectures, without which proofe of ſuch the teſtators meaning, the legacie is ſo ſurely extinguiſhed, that albeit the teſtator did pull downe the houſe, with intent to reedifie the ſame, or to make it bigger[r]: and albeit it were reedified of the ſame matter or ſtuffe[s], yet it cannot be recouered as due to the legatarie: for now hauing a new form, it is not the ſame but another houſe[t], and ſo being another thing thē that which was bequeathed, how can it be rightly chalenged by the legatarie[v].

What if the houſe bequeathed be blowen downe with violence of the winde, or be conſumed with fire, or otherwiſe by caſuall means deſtroyed, againſt the will of the teſtator, and a new houſe erected by the teſtator, in the place where the former ſtood; whether may the legatarie recouer the houſe newly erected? By the opinion of ſome he may[x], for if the teſtator had not erected a new houſe, by the ciuill lawes the ground whereon the houſe did ſtand, ſhould belong to the legatarie[y]. Seeing then the grouñd

n) Text. in d. L. ſi ita legatum. § ſi domus. Maſcard. de probac. concluſ. 1280. n. 27.
o) Eod. §. ſi domus.
p) L. at ſi clerici. §. plerique ff. de relig. & ibi Bald.
q) Arg. L. 1. §. 1. de leg 3 ff. Brook Abridg. tit. deuiſe. n. 8.
r) Iaſ. in d. L. ſi ita. §. vlt de lega. 1. ff. n. 13. in fin.
s) Paul. de Caſtr. & Iaſ. in d. §. ſi domus. Maſcard. de probac. concl. 1280. n. 25.
t) Idem Caſtrenſ. Iaſ. & Maſcard. vbi ſupra. Maſcard. de probac. concluſ. 1180. n. 25.
v) Vide DD. in L. inter ſtipulantem. ff. de verb oblig.
x) Iaſ. in L. domos. ff. de leg. 1. n. 1. & in L. ſi ita legatum. §. ſi domus. eod. tit. n. 13.
y) L. ſi grege legato. ff. de leg. 1. in fin. Paul. de Caſtr. in d. §. ſi domus. verb. ſed pone. & ibi Iaſ. n. 2. & 7.

is the legataries, it followeth that the houſe is the legataries alſo[z]. Howbeit the authour of this opinion in another place is of another opinion[a], which opinion is alſo commended of other writers, as more agreeable to law[b], becauſe this houſe is another houſe then that which was bequeathed. And again, the text of the ciuill law is plaine, that *the houſe bequeathed being deſtroyed, if the teſtator build another in the ſame place, the legacie is extinguiſhed, vnleſſe the meaning of the teſtator were otherwiſe*[c]. Seeing then, the text dooth not diſtinguiſh of the meanes whereby the houſe is deſtroied, neither may we[d].

To the† former reaſon that the ground had belonged to the legatarie, if the teſtator had not builded a new houſe, *ergo* the houſe alſo: It is anſwered, that if it were graunted (which of diuers is denied) that the ground ſhould be ong to the legatarie[e], yet ſhould it not belong vnto him as principall, but as acceſſarie, or part of the houſe beque athed[f]: and therefore being but acceſſarie, it dooth not receiue any other acceſſe or augmentation[g]. How be it, foraſmuch as theſe queſtions aboute houſes deuiſed by will, afterwards deſtroyed, and then reedified, are rather to be determined by the lawes of this realme, then by the ciuill law: I do willingly yeeld the matter into their hands, to whom it principally apperteineth. 11

Furthermore, if † the teſtator *being conſtrained by need*[h], as to pay his debts, or to prouide him food, or other like neceſſarys[i], do as it were vnwillingly alienate the thing by him before bequea- 12

z) L. ſi ſeruum filij. §. ſi a ex. ff. de leg. 1. Iaſ. & Paul. de Caſtr. vbi ſupr

a) Iaſ. in L. domus. ff. de leg. 1. n. 13.

b) Maſcard. Tract. de probac. concluſ. 1280. n. 27. & Mantic. de coniect. vlt. vol. lib. 12. tit. 2 n. 6.

c) Text. in d. § ſi domus.

d) Maſcard. & Mantic. vbi ſupra.

e) Raph. Cu. Petr. de Bexu. in d. §. ſi domus, & ibi Iaſ. n. 13.

f) Bar. Paul. de Caſtr. Iaſ. in d. §. ſi domus.

g) Idem Bar. Iaſ. & Paul. de Caſtr. vbi ſupr.

h) L. fideicommiſſ. §. ſi rem. ff. de leg. 3. L. rem legatam. de adimen. leg.

i) Mi ſing. in §. ſi rem. Inſtit. de lega. Berous. q. 9. Adde quod ſiuè neceſſitas ſit ex re familiari. ſiuè ex lege vti aq; impedit præſumptionem reuocationis legati. Maſcard. de probac. concluſ. 1280. n. 126

bequeathed, this is no ademption of the legacie[k], and therefore is the executor bounde to redeeme the same, or to pay the iust value therof to the legatarie, vnlesse he prooue that the testator did purpose by the saide alienation to take away the legacie[l], or vnlesse the legacie were conditionall, and the alienation made before the condition were extant or accomplished[m]. But † if the testator *not constrained by necessitie, doo of his owne accord* alienate the thing bequeathed (as if he giue the same freely[n], or doo sell the same of intent to gaine thereby[o]) this is an ademption of the legacie[p]: which cõclusion† hath place, although the gift or alienation bee void in lawe[q]: For it is sufficient in last willes, for the reuoking of a legacie that the testators meaning doo appeare euen by a sufficient acte[r].

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Secondly, this conclusion † hath place although the testator should redeeme the thing alienated, the alienation being lawful[s]: and therfore if the legatarie should after the death of the testator demaund the legacie alienated, and redeemed, his petition were to be repelled, vnlesse he did prooue a new will of the testator, or some approbation or ratification of the former will, after the redemption of the thing alienated[t], or vnlesse the legacie be of freedome from

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k) d.L. fideicommissa. §. si rem.

l) d. §. si rem. Instit. de lega. Mascard. de probac. d. cõcl. 1280. n. 127.

m) L. Stichum. ff. de lega. 1. Bald. in L. 3. C. de lega. n. 6.

n) L. rem legatam. ff. de adimen. lega.

o) Berous. d. q. 9.

p) Bar. & alij, in L. rem legatam. ff. de adimen. leg. & in L. 3. C. de lega.

q) L. legatum §. pater ff. de adimen. lega. Bar. in L. cum dñs. §. fin. de pecul. leg. 1. Socin. sen. consil. 104. n. 11. vol. 3. Couar. in Rub. de testa. extra. 2. part. n. 21. Mantic. de coniect. vlt. vol. lib. 11. tit. 6. n. 2. quod locum habet tametsi legatum fuerit expressim legatum, & hæc sententia verior est, & receptior. testibus Mantica vbi supra. Mascardo de probatione concl. 1280. n. 98. Gabriel. cons. 103.

r) Idem iuris est, si facta alienatione dominium non sit translatum. Mantic. d. tit. 6. n. 3.

Mascard. d. concl. 1280. n. 103. Et licèt non desint magni nominis Interpretes, qui in contraria stant sententia, per L. prædia §. libert. de Instr. leg. Falsissima tamen est horum sententia, si verum dicat Gabr. d. consil. 103. Tu verò dic vt per D. Gentilem, acutissimè de hac re differentem. lib. 1. epist. c. 10. (r) Couar. in d. Rub. part. 2. n. 21. verb. aduertendum. Grass Thesaur. com op. §. legatum. q 78. in fin. (s) L. cum seruus. ff. de adimen. leg. (t) d. L. cum seruus.

bondage[v], or giuen to some godly or charitable vse[x]: or vnles the alienation were necessarie, not voluntarie[y], or vnles the legatarie be neere of kin or allied vnto the testator[z]: In these and in some other cases, the legacie redeemed may be recouered, as if the same had neuer bene alienated[a]. Peraduenture also by the lawes of this realme† 16 landes, tenements, and hereditaments, being first deuised, and after the deuise alienated, and after the alienation redeemed, may be recouered, as if the same had not bene alienated[b]. The† 17 reason of this law may be, because the alienatiō dooth not defeate the will, which is not as yet of any force vntill the testator be deade[c]: but the reason of the ciuill lawe is, because by this voluntarie or vnconstrained alienation, or gift of the thing bequeathed, being an act contrarie to the former acte of the testator, his will and meaning, (which is the life and souse of the testamēt,) is straight wayes presumed to be changed[d], and consequently the legacie not to be asleepe, (as some doo dreame) but to be quite dead and extinguished[e]; and being once dead, cannot easily be awaked, but standeth in need of a new consent or other liuely act before it can be reuiued[f].

If† the thing bequeathed be not fully alie- 18 nated, as if it be pledged or pawned, the legacie is not thereby extinguished[g]: and therefore the executor in this case is bound to redeeme the same, and to restore it to the legatarie, or to pay the price thereof if he suffer it to be forfaited[h]. Likewise, if some part onely of the legacie be alienated

v) L. verū. ff. de testam. manumiss.
x) Manning. in d. §. si rē. Instit. de lega. Mantic. d. tit. 6. n. 6. Mascard. d. concluf. 1280. n. 112.
y) Bart. in d. L. cum seruus.
z) L. filia. § Titio. ff. de cond. & demon. Masc. d. concl. 1280. n. 111.
a) Mascard. d. concluf. 1280. n. 108. 109. &c. vbi alias videre licet huius regulæ exceptiones.
b) Brook. abridg. tit. deuise. n. 8.
c) Brook. eodem loco.
d) Aretin. in §. si rem Instit. de lega. Socin. sen. consil. 103. in fin. Mascard. de probac. concl. 1280. n. 100. Sichard. in L. 3. C. de leg. n. 5.
e) Sichard. in d. L. 3. C. de leg. n. 5. 8.
f) L. cum seruus ff. de admen. lega.
g) L. qui post. C. de lega.
h) Istam conclusionem limitat & sublimitat Mascar. de probatione concluf. 1280. n. 56. &c. quem velim videas.

alienated, the other part not alienated is due, and may be recouered[i], vnleſſe it be prooued that the teſtator did meane by alienating part, to take away the whole legacie[k]; or if the legacie be alternatiue, as if the teſtator bequeathe ſomething, or the value thereof, the thing being alienated, yet may the value be recouered[l].

i) § ſi rem. Inſtit. de legat.
k) Eod. § in fin.
l) Bald. & Paul. de Caſtro. in L. 3. C. de lega.

19 If the † teſtator doo bequeath an obligation, or a ſumme of money due vnto him, and afterwards the debter vnprouoked dooth voluntarily pay the debt due vnto the teſtator, the receit of the ſame is no ademption of the legacie[m]: but if the teſtator do prouoke the debter to make paiment, then by receit thereof the legacie is extinguiſhed[n], vnleſſe the legatarie be able to prooue, that the teſtator did not thereby meane to reuoke the legacie[o], for that peraduenture the teſtator exacting and receiuing the money, did lay it vp, and ſafely keepe it for the legatarie[p], or did vtter in woordes that he did not intende thereby to reuoke the legacie[q]: In theſe caſes the legacie is not reuoked[r].

m) L. fideicommiſſa. §. ſed ſi rem. ff. de leg. 3. Mantic. de coniect. vlt. vol. lib. 12. tit. 2. n. 19.
n) d. §. ſed ſi rem. & ibi Bar. & alij. L. pater. ff. de adimen. leg. Maſcar. de probac. concl. 1280. n. 130.
o) d. §. ſed ſi rem.
p) Eod. §. ſed ſi rem. & ibi Bar. in fin & Bald. circa med.
q) Bar. in d. §. ſed ſi rem,

20 Finally †, If the teſtator do bequeath a flocke of ſheepe, and afterwards the number decreaſing, they become fewer then a flocke, (a flocke conſiſteth of ten at the leaſt[s]) be it that of al the flocke there be left but one: In this caſe the will of the teſtator is not preſumed to be altered, nor the legacie adempted, and therefore that one ſheepe is due[t].

r) Vide Maſcar. d. concluſ. 1280. n. 132, 133.
s) L. ſi grege. ff. de leg. 1. & DD. ibid.
t) §. ſi grex. Inſtit. de lega.

Of translation of legacies.

1 *Translation of a legacie what it is.*
2 *Euery translation includeth an ademption.*
3 *What if the person to whom the legacie is transferred, be incapable thereof.*
4 *Certaine cases wherin translation of the legacie doth not include an ademption.*
5 *The legacie is presumed to be transferred with the charge imposed on the first legatarie.*
6 *Certaine exceptions of this conclusion.*
7 *One and the same thing bequeathed, first to one, and afterwards to another, whether it be wholy taken from the former legatarie.*
8 *If in the second disposition there be no mention of the former, it is not wholy taken from the former legatarie.*
9 *If there be mention of the former bequest, yet the thing bequeathed is not wholy taken away.*
10 *Certaine limitations of this last position.*
11 *Difference betwixt these wordes, I giue and I bequeath.*
12 *What if the legacie consist in quantitie.*
13 *What if one summe be twise bequeathed to one person, whether is it twise due.*

§. XXI.

TRanslation † of a legacie is a bestowing of the same vpon an other [a], as ademption may be made either in the same testament or in codicils, simplie 1

a) Minsing. in tit. de ademp. lega. Inst. n. 4.

ſimplie or condicionally: ſo may tranſlation of legacies likewiſe[b].

b) Tit. de ademp. leg. Inſtit. L. tranſlatio. eod. tit. ff. & DD. ibid.

A legacie † being transferred from one to another, the legacie is taken away from the former
3 legatarie, albeit † the ſecond legatarie be incapable of the legacie[c]: for howſoeuer that acte is ſaide not to miniſter impediment, which is altogither without effect[d], yet foraſmuch as by this tranſlation it dooth appeare to be the teſtators will and meaning, firſt to haue the legacie taken away from the former legatarie: this will and meaning ought to be obſerued, ſo far as it may[e], and ought not therefore to be hindered in one thing, becauſe it cannot be performed in another[f]. For as I ſaid before, euerie † tranſlation
4 doth preſuppoſe & include an ademption[g], except in certaine caſes following. The firſt caſe is, when the teſtator in the time of great & extreme ſickneſſe, transferring a legacie, or beſtowing the ſame vpon an other, dooth afterwards recouer his health: for by this recouerie the tranſlation is voide, and the former legacie confirmed[h]. Another caſe is, when the teſtator hauing bequeathed a legacie to one, and hauing prouided that if the legatarie will not do ſuch a thing to a nother perſon, that then that other perſon ſhall haue the legacie: In this caſe if the former legatarie be preuented by death, that he cannot perfourme the condition though hee would, the ſecond legatarie cannot obtaine the legacie[i]. The thirde caſe is, when the legacie dooth conſiſt in quantitie; as when the teſtator dooth bequeath to one man an hundred pound,

c) L. plane. §. 1. de leg. 1. L. & ſi transferam de adim. leg. ff.

d) c. non præſtat. de reg. iur. 6.

e) Minſing. in d. tit. de ademp. leg. n. 6.

f) Bar. Iaſ. & alij, in d. L plane.

g) Cæterum an tranſlatio ſit expreſſa vel tacita primi legati reuocatio, quæſtio eſt cui nõ eodem modo reſpondent omnes: Tu autem videas Couarr. in Rub. de teſta. extra. 2. part. n. 21.

h) L. Titia. §. vlt. de adimen. leg. ff. Mantic. de coniect. vlt. vol. lib. 12. tit. 3. n. 2.

i) L. ſancimus C. de pœnis. Iaſ. in L. cum proponas. C. de hæred. inſtit. & Mantic. de coniect. vlt. vol. lib. 12. tit. 3. n. 2.

pound, and immediately after to another man an hundred pound: here is neither translation nor ademption of the former legacie, but two seuerall legacies[k]. But yet if the testator do limit this summe to some certaine bodie, as if the testator bequeath to one man an hũdred poũd which lieth in his chest; then it is all one as if he said, he did bequeath his signet, his bookes, or his armour, whereof we shall haue occasion to speake shortly after[l].

k) L. plane. §. 1. de leg. 1. L. paulo. in prin. de leg. 3. ff.

l) Infra hoc ipso §. n. 7. 11.

Furthermore, it is to be † noted in this place, 5 that where any legacie is transferred from one to another, it is presumed to be transferred to the second legatarie, with such charge, or vpon such condition, as it was left to the former legatarie, albeit in the translation there be no expresse mention of any such charge of condition[m]: For example; the testator giueth to one person an hundred pound, charging him to destribute ten shillings yearly amongst the poore during ten yeares: afterwards the testator doth bestow that hundred pound vpon an other person, without mention of any such yearely destribution: In this case the second legatarie is charged with the yearely paiment and distribution of ten shillings, euen as the former legatarie[n]: neither can he accept the one part of the legacie without the other[o]: sauing † in certaine 6 cases. One case is, if he be able to prooue the testators meaning to be contrarie, viz. that it was the testators meaning to transferre and bestow the legacie simplie without any such charge or condition[p]. Another case is, when the cõdition

m) L. Gaio. ff. de alimẽ. & cib. leg. L. legatum. de adimen. leg. Paul de Castr. consil. 327. vol. 1.

n) Bar. in d. L. Gaio. Mantic. de coniect. vlt. vol. lib. 12. tit. 3. n. 3.

o) L. legatarius. §. si legatum. de leg. 1.

p) d. L. Gaio.

is ſuch, as the ſame dooth cleaue to the perſon of the former legatarie [q]: For example; the teſtator dooth bequeath to a woman with childe an hundred pound, if ſhe be deliuered of a boy: this condition doth cleaue to the perſon of the former legatarie, and ſo is not transferred with the legacie [r]. The third caſe is, when the tranſlation is made to the ſame perſon, without mention of any further charge or condition: for then leaſt the ſecond bequeſt ſhould ſeeme ſuperfluous, it is thought to be the meaning of the teſtator, by the ſecond bequeſt to giue the ſame ſimplie [s]. The fourth caſe is, when in the tranſlation of the legacie, there is a new ſpeciall charge impoſed vpon the ſecond legatarie: for then the olde charge impoſed to the former legatarie is preſumed to be remitted, leaſt otherwiſe the later legatarie ſhould bee preſſed with a double charge [t].

q) L. legatum ſub conditione. de adimen. leg. L. legatum ſub conditione. de condict. & demon. ff.

r) d. L. legatum ſub cõditio. de adim. legat. & ibi DD.

s) L. ſi tibi. de adimen. leg. ff.

t) L. Alumne. de adimẽ. le. Paul. de Caſtr. conſi. 327. vol. 1. Mantic. de coniect. vlt. vol. lib. 12. tit. 3.

What if the teſtator after he haue giuen a legacie to one perſonne, doo afterwardes bequeath the ſame to another perſon, whether is this an ademption of the former legacie, or whether ought both the legataries to concurre, and to haue the legacie betwixt them.

For anſwere, we are to conſider, whether ſome *ſpeciall and certaine* thing is bequeathed, or a thing conſiſting *in quantitie*.

In the former caſe, namely when ſome *ſpeciall or certaine* thing is bequeathed; it is materiall whether the legacie be of lands, tenements, or hereditaments, and ſo the queſtion determinable in the temporall court, according to the lawes

lawes temporall of this land, are of goods, and so the controuersie to be decided in the ecclesiasticall court, according to the lawes ecclesiasticall of this realme. If of lands, tenements, & hereditamẽts, as when the testator (for example) doth in the former part of his wil, deuise his lãds in such a place to one in fee, and afterwards in the later part of the same will, to another person in fee: it seemeth by the lawes of this realm, that the later part doth ouerthrow the former[s]. And that as the later testament dooth destroy the former testament: so the later part of a testament, doth infringe the former part of the same testament, when it is contrarie thereunto: neuertheless I wil not presume to affirme, that this conclusion is vndoubtedly certaine, but with due submission surrender the same, to be discussed by the learned in the lawes temporall, vnto whom it rightly appertaineth.

If the deuise be of goods; as when the testator dooth bequeath his signet, his bookes, or his horse, &c. First to one person, and afterwards to another person: then in case the second legacie be simple, (I meane without mention of the former) the former legacie is not taken away, but the two legataries concurring, ought to diuide the legacie betwixt them[v]. The reason and foundation whereupon this conclusion is builded, is the testators constancie, wherin the ciuill law dooth repose such confidence, that whẽ he hath once bequeathed a thing, he is not presumed to take the same away[x], without euident presumption[y] of the alteration of his former

s) Plowd. in cas. inter Paramor & Yardley. fol. 541.

t) Eadẽ enim est ratio partis ad partem, atque totius ad totum. Euerard. loc. top. à toto ad partem.

v) Paul. de Castro. Ias. & Zas. in L. si pluribus. ff. de leg. 1. Ripa. in L. reconiũcti. n. 21. de leg 3.

x) d. L. si pluribus. verb. si quidem euidentissimè.

y) Raph. Cum. in d. L. si pluribus. & ibi Ias. n. 12, & 13. & zas. n. 14. qui omnes tenent sufficere coniecturalem probationem, non obstante quod Textus exigat euidentissimam. Quin imo, probatio vel ex coniecturis emergens, dicitur euidentissima, in translatione legatorum. Ias. vbi supra. post Bar. in L. si constante. ff. sol. ma. n. 12.

former resolution. Insomuch that if one and the same thing be left to one person in the testament, and to another in the codicill, yet is not the testator presumed so variable, as vtterly to take away the former legacie, but rather that both the legataries are to concurre, and so to diuide the legacie betwixt them [z]. Where it is said that as the later testament doth destroy the former testament: so likewise the later part of the testament, dooth ouerthrow the former part thereof: That is true, when it is euident that the testator did meane it should be so [a]: But if it be doubtfull, then without all doubt we ought to labour diligently to saue the testament from cõtradiction [b], and not suffer one part to fight and brawle with another; much lesse to permit one part to kill and destroy another, in case there be any place for peace, or hope of reconciliation to be had betwixt them. Againe, the argument is not of equall force, *à parte ad partem*, with the argumẽt *à toto ad totum*, in case there be inequalitie or diuersitie of reason betwixt the one and the other [c], as in this case: For say that such is the force of *posterioritie* in testaments, that the later dooth still destroy the former [d], without any other reuocation [e]: Say and thinke, that the life of the later testament is euermore the death of the former testament, euen because it is the later [f]: yet how can it be thereby iustified, that the later part of a testament dooth destroy the former part, whereas ueither part doth receiue any life before the other [g]: for vntill the whole testament be completed, the partes thereof are as the

z) Bald. in L. cohæredi. §. cohæres. in fin. de vulg. & pup. sub. ff. Alex. consil. 169. vol. 5. Mantic. de coniect. vlt. vol. lib. 12. tit. 2. n. 3.

a) d. L. si pluribus. & ibi DD. Mantic. de coniec. vlt. vol. lib. 12. tit. 2. n. 3. in fin.

b) Mantic. de coniect. vlt. vol. lib. 3. tit. 5. in fin. Socin. Iun. consil. 125. vol. 1. n. 5.

c) Euerard. d. loco, à toto ad partem. n. 7. post Cyn. & alios legũ interpretes. in L. cum notissimi. §. in his. C. de præscrip. 30. ann.

d) §. posteriore. Instit. quib. mod testam. infirm.

e) Viglius. & Minsing. in d. §. posteriore.

f) Grass. Thesaur. com. op. §. testm̃. q. 860. in prin & supra eadem part. §. 14.

g) Bar. in L. si quis. ff. de testa. L. ex ea scriptura. cod. tit.

the senceleſſe partes of an vnperfect creature, or confuſed *embrio*[h]: and doo receiue their life altogether at one inſtant; namely when the teſtator hauing finiſhed his teſtament, dooth approue the ſame for his laſt wil, and not before[i]: Like as they do receiue their ſtrength all at one moment, namely at the death of the teſtator, and not before, at which time the foreſaid *Embrio* being now growen to a perfect childe, is then brought into the world, when the teſtator doth depart out of the world[k].

If the ſecond bequeſt be qualified with mentiō of the former: for example; the teſtator ſaith, *my ſignet which I bequeathed to A.B. I bequeath to C.D.* whether in this caſe the former legacie be quite taken away, or in part, is a queſtion wherin the writers do greatly vary[l]: but the greater nūber incline to this opinion, that the former legacie is not wholy taken away, but that they are both ioint legataries[m], except in certain caſes. One is when it may appeare (at leaſt by coniectures) that it was the teſtators meaning to take away the legacie from the former legatarie wholy.[n] Another is, when the ſecond bequeſt is not made in the ſame teſtament, but after in ſome codicill'. Another caſe is, when the teſtator in the ſecond diſpoſition ſaith, that which I did *bequeath* to A.B, *I giue* to C.D: for this word *giue*, is of ſuch force, that it ſeemeth wholy to take away the former legacie[p].

h) d L. ex ea ſcriptura, Imo (inquit Textus) teſtamentum imperfectum eſt ſine dubio nullum. §. pen. Inſtit. quib. mod. teſta. infir.

i) Iul. Clar. §. teſtm. q. 7. in fin.

k) Chrof. Porcus. in §. in extraneis. Inſtit. de hær qual. & different. c. Marth. de celebr. miſſ. extra.

l) Id quod patet per Mantic. de coniect. vlt. vol. lib. 12. tit. 4 per Couar. in Rub. de teſta. extra part. 2. per Graſſ. Theſaur. com. op. §. legatum. q. 8. per Vaſq. de ſucceſſ. progreſſ. lib 3. §. 23. n. 96. &c. & per Doctores, in L. plane. & L. ſi pluribus. ff. de leg 1.

m) Bar. in L. re coniuncti. ff. de leg. 3. cuius opinionem frequentiori calculo receptam monſtrat nobis Mantic. de coniect. vlt. vol. lib. 12. tit. 4. n. 1. et refert Graſſ. Theſaur. com. op §. legatū. q. 180.

n) Bar. in d. L. re coniuncti. Mantic. d. tit. 4. n. 8. Graſſ. d. §. legatū. q. 80. n. 2.

o) Ripa. in d. L. re coniuncti. n. 23. de leg. 3. ff. Mantic. d. tit. 4. n. 10. ci. de verb. ſig ff. n. 13.

(p) Couar. in Rub. de teſta. extra. part. 2. n. 21. Alciat. in L. triplici. Maſcard. Tract. de probac. concluſ. 1280. n. 47.

In

In the ſecond caſe, that is to ſay, when the legacie dooth conſiſt in *quantitie*, if the teſtator doo bequeath to one man an hundred pound, and immediately to another man an other hundred pound: here is neither tranſlation, nor ademption, but two ſeuerall legacies; and either legatarie in this caſe ſhall recouer an hundred pound[q], as I haue ſhewed before. Where alſo I ſignified, that if the teſtator doo reſtraine this quantitie to a certaine bodie, as to the hundred pound ſealed vp in ſuch a bagge, then it is reduced to that caſe of bequeathing a certaine ſpeciall thing, as the teſtators ſignet, firſt to one; and then to another[r].

If the teſtator doo bequeath to one man an hundred pound, and afterwards in the ſame teſtament bequeatheth to the ſame man an hundred pound; the ſecond diſpoſition is vnderſtood to be but a repetition of the former, and all but one legacie[s]: wherefore the legatarie in this caſe can recouer but one hundred poũd; vnleſſe he make proofe that it was the teſtators meaning, that he ſhould haue two hundred pound[t]: or vnleſſe an vnequall quantitie be giuen to the ſame legatarie; as if the teſtator doo bequeath in one part of his teſtament an hundred pound, and in another part fiftie pound: for in this caſe the legatarie may recouer an hũdred and fiftie pound[v]: or vnleſſe where two equal ſũmes be left to one perſon, the one quantitie were left in one writing, and another quãtitie in another writing, ſuppoſe one C. pound in the teſtament, another hundred pounde in

q) Atque hæc concluſio ſine contradictione vera eſt. Minſing. in §. transferri. Inſtit. de ademp. leg. n. 8.

r) L. plane. §. ſi eadem. de leg. 1 ff. verb. ſed hoc ita. & Zaſ. eod. §. n. 3. verb. ſed finge.

s) Gloſſ. in d. L. plane. §. 1. & ibi Iaſ. n. 11. & Zaſ. n. 14. Michael. Graſ. Theſaur. com. op. §. legatũ. q. 60. Contra quã opinionẽ quantumuis communem, emanauit diſputatio à D. Gentil. condita, non inelegans, nec iniucunda. Hanc ipſe legito. lib. diſputac. fol. 51.

t) Tunc enim ſæpiùs præſtanda eſt ſumma, ſi modò euidentiſſimis probationibus oſtendatur teſtatorem multiplicare legatum voluiſſe. d. §. 1.

v) L. cum centum. de adimen. leg. ff. Iaſ. in d. § 1. Graſſ. d. q. 60. vbi ſcribit hanc op. eſſe com.

the codicill; for here the legatarie may recouer two hundred pound[x], as two seuerall legacies, except the executor proue the testators meaning to be contrarie[y].

x) Ias. & Zas. in d. L. plane. §. si eadē. de leg. 1. & hæc op. com est, vt per eosdē Doctores: & per Graff. d. §. legatū q. 60. & per Ripam. d. L. coniūcti. de leg. 3. ff.

y) Minsin. in tit. de adē. legat. Instit. n. 8.

Of diuerse meanes vvereby legacies are lost, considerable in the legatarie.

1 *By what meanes he that is named executor is made incapable of the executorship, by the same meanes doth the legatarie lose his legacie.*

2 *The legacie is lost by reason of enimitie betwixt the testator and the legatarie.*

3 *Diuerse extensions of this conclusion.*

4 *What if the testator were the cause of the enimitie, and the legatarie in no fault.*

5 *Certaine cases wherein the legacie is not lost by reason of enimitie.*

6 *The legatarie being appointed tutor, looseth his legacie, if he refuse the tutorship.*

7 *The legatarie, if he accuse the testament of falsitie, looseth his legacie.*

8 *The legatarie which dooth cancell the testament, doth loose his legacie.*

9 *The legatarie dooth loose his legacie, who of his owne authoritie dooth take and possesse the thing bequeathed.*

10 *Certaine cases wherein the former conclusion is limited.*

§.xxii.

IN reſpect of the fact and perſon of the legatarie, the legacie may become void diuers wayes. And firſt generally† by all the meanes aboue recited, whereby the executor is made incapable of the executorſhip[a]: as if the legatarie doo become an heretike, an apoſtata, or doo forbid the teſtator to alter his will, &c. of all which meanes we haue ſpoken alreadie[b], wherefore wee ſhall let them paſſe, and deſcende to ſome particular cauſes not yet mentioned. 1

a) Gloſſ. in L. 3. §. fin. de adimen. leg. ff. L. ex part. eod. tit. Mantic. de coniect. vlt. vol. lib. 12. tit. 4. n. 2.

b) Supra part. 5. §§. 2. 3. 4. cum ſeq. & ſupr. ead. part. §. 18.

Firſt therefore, if the† legatarie *become enimie to the teſtator*, he looſeth his legacie[c]. For beſides that he ſeemeth vnworthie of a benefite at his handes, whom he dooth offend and iniurie, it is not likely that the teſtator would, that that perſon which doth perſecute him with hatred and enimitie whiles he liueth, ſhould reape any commoditie by his teſtament when he is dead[d]: and therefore if the teſtators enimie ſhould demaund any legacie, he might iuſtly be repelled, by reaſon of the defect of the teſtators will and conſent[e], which conſent is the life and ſoule of the teſtament. 2

c) L. 3. §. fin. de adimen. leg ff. Tiraquel. in reg. ceſſante cauſa. n. 127. Mantic. de coniect. vlt. vol. lib. 12. tit. 5. in prin.

d) L. ſi inimicitiæ. ff. de his quib. vt indig. L. nec adiecit. ff. pro ſocio. Maſcard. de probac. concluſ. q. 1280. n. 137.

e) DD. in d. L. ſi inimicitiæ. & in d. § fin.

The† extenſions of this concluſion are theſe. Firſt, albeit the teſtator doo afterwards make ſome codicill, or additions to his teſtament, and do not therin expreſſy reuoke the legacy, before bequeathed in his laſt teſtamẽt, yet 3

lawes temporall of this land, are of goods, and so the controuersie to be decided in the ecclesiasticall court, according to the lawes ecclesiasticall of this realme. If of lands, tenements, & hereditamẽts, as when the testator (for example) doth in the former part of his wil, deuise his lãds in such a place to one in fee, and afterwards in the later part of the same will, to another person in fee: it seemeth by the lawes of this realm, that the later part doth ouerthrow the former[s]. And that as the later testament dooth destroy the former testament: so the later part of a testament, doth infringe the former part of the same testament, when it is contrarie thereunto: neuertheless I wil not presume to affirme, that this conclusion is vndoubtedly certaine, but with due submission surrender the same, to be discussed by the learned in the lawes temporall, vnto whom it rightly appertaineth.

If the deuise be of goods; as when the testator dooth bequeath his signet, his bookes, or his horse, &c. First to one person, and afterwards to another person: then in case the second legacie be simple, (I meane without mention of the former) the former legacie is not taken away, but the two legataries concurring, ought to diuide the legacie betwixt them[y]. The reason and foundation whereupon this conclusion is builded, is the testators constancie, wherin the ciuill law dooth repose such confidence, that whẽ he hath once bequeathed a thing, he is not presumed to take the same away[x], without euident presumption[y] of the alteration of his former

s) Plowd. in cas. inter Paramor & Yardley. fol. 541.

t) Eadẽ enim est ratio partis ad partem, atque totius ad totum. Euerard. loc. top. à toto ad partem.

v) Paul. de Castro. Ias. & Zas. in L. si pluribus. ff. de leg. 1. Ripa. in L. re coniũcti. n. 21. de leg 3.

x) d. L. si pluribus. verb. si quidem euidentissimè.

y) Raph. Cum. in d. L. si pluribus. & ibi Ias. n. 12. & 13. & zas. n. 14. qui omnes tenent sufficere coniecturalem probationem, non obstante quod Textus exigat euidentissimam. Quinimo, probatio vel ex coniecturis emergens, dicitur euidentissima, in translatione legatorum. Ias. vbi supra. post Bar. in L. si constante. ff. sol. ma. n. 12.

former resolution. Insomuch that if one and the same thing be left to one person in the testament, and to another in the codicill, yet is not the testator presumed so variable, as vtterly to take away the former legacie, but rather that both the legataries are to concurre, and so to diuide the legacie betwixt them [z]. Where it is said that as the later testament doth destroy the former testament: so likewise the later part of the testament, dooth ouerthrow the former part thereof: That is true, when it is euident that the testator did meane it should be so [a]: But if it be doubtfull, then without all doubt we ought to labour diligently to saue the testament from cõtradiction [b], and not suffer one part to fight and brawle with another; much lesse to permit one part to kill and destroy another, in case there be any place for peace, or hope of reconciliation to be had betwixt them. Againe, the argument is not of equall force, *à parte ad partem*, with the argumẽt *à toto ad totum*, in case there be inequalitie or diuersitie of reason betwixt the one and the other [c], as in this case: For say that such is the force of *posterioritie* in testaments, that the later dooth still destroy the former [d], without any other reuocation [e]: Say and thinke, that the life of the later testament is euermore the death of the former testament, euen because it is the later [f]: yet how can it be thereby iustified, that the later part of a testament dooth destroy the former part, whereas ueither part doth receiue any life before the other [g]: for vntill the whole testament be completed, the partes thereof are as

z) Bald. in L. cohæredi. §. cohæres. in fin. de vulg. & pup. sub. ff. Alex. consil. 169. vol. 5. Mantic. de coniect. vlt. vol. lib. 12. tit. 2. n. 3.

a) d. L. si pluribus. & ibi DD. Mantic. de coniec. vlt. vol. lib. 12. tit. 2. n. 3. in fin.

b) Mantic. de coniect. vlt. vol. lib. 3. tit. 5. in fin. Socin. Iun. consil. 125. vol. 1. n. 5.

c) Euerard. d. loco, à toto ad partem. n. 7. post Cyn. & alios legũ interpretes. in L. cum notissimi. §. in his. C. de præscrip. 30. ann.

d) §. posteriore. Instit. quib. mod testam. infirm.

e) Viglius. & Minsing. in d. §. posteriore.

f) Grass. Thesaur. comop. §. testm̃. q. 860. in prin. & supra eadem part. §. 14.

g) Bar. in L. si quis. ff. de testa. L. ex ea scriptura. cod. tit.

the

is it still presumed to be reuoked secretly, and in the intent of the testator, by reason of the aforesaid hatred or enimitie[f].

Secondly, the former conclusion hath place, albeit the testator were ignorant of the iniurie done vnto him by the legatarie, when it is such an iniurie, for the which it is verie likely that the testator would haue reuoked his legacie, if he had knowen thereof: as if the legatarie haue committed adulterie with the testators wife, or haue deflowred his daughter[g].

Thirdly, if the wife diuert or depart from her husband, without his good fauour, she looseth hir legacie[h].

Fourthly, he which dooth accuse the testator of any capitall crime, looseth his legacie[i].

Fiftly, he which becommeth capitall enemie to the testators brother, loseth his legacie[k].

Sixtly †, albeit the testator himselfe were 4
the cause of the enimitie, and the legatarie in no fault, yet shall the legatarie loose his legacie[l]: which conclusion may seeme hard, but the reason is easie, namely, because where the testator hath conceiued enimitie, there is he presumed to haue altered and reuoked his will[m]: which alteration and reuocation is so much the rather presumed when the testator himself is the cause of the enimitie, for he that wil be enemie without a cause, is lesse a friend then he that is vnwillingly made an enemie. And therefore I do the rather incline to their opinion, which hold that the legacie is taken away by enimitie arising from the testator, without any iust cause giuen

f) L. filio. §. seia. & ibi Bar. de adimen. leg. ff. Rip. in L. vlt. de reuoc. don. C. Mantic. de coniect. vlt. vol. lib. 12. tit. 5. n. 2. Mascard. de probac. concl. 1280. n. 138.

g) Gloss. in L. fideicommissum. C. de fideicommiss. Mantic. de coniect. vlt. vol. lib. 12. tit. 5. n. 6. & quidem ipso iure tollitur legatū si viuēte testatore stuprauit eius vxor. eo verò defuncto, ope exceptionis Apost. ad gloss. in d. L. fideicōmissum.

h) L. vxori de aur. & argent. leg. ff. & ibi gloss. cum Bar. Mascard. de probac. conclus. 1280. n. 140. Mant. d. tit. 5. n. 3

i) L. filio. §. seia. ff. de adimen. leg.

k) Mantic. de coniect. vlt. vol. lib. 12. tit. 5. n. 8.

l) Mantic. d. tit. 5. n. 9. Ias. in L. si filiam. C. de inoffic. test. Rip. in L. vlt. C. de reuoc. don. n. 151. Couar. in Rub. de testa. extr. part. 2. n. 19. versic. 5. in fin. contra opinionem Bar. à multis olim quidem receptam (quorum diligenter meminit Cotta in causa sororis suæ, asseuerās eam esse communē in memorabilib'. verb. inimicitię) sed hodie magis communiter reprobatā, vt refert Mascard. de probac. concl. 1280. n. 144.

m) Mant. d. tit. 5. n. 9. L. 3. §. vlt. de adimē. leg. ff.

giuen by the legatarie. If any thinke that this opinion dooth sauour more of law then of equitie, let him yet consider that euen in equitie, the legatarie, although innocent, ought not to receiue any fauour against the wil of the testator[n]: At least howsoeuer the legararie were in no fault at the first, if at the last being prouoked by the testator, he become his enemie, seeking to be reuenged for the iniurie done vnto him: in this case hee leeseth his legacie, euen as well as if he himselfe had first broken the bond of amitie[o].

n) Dec. consil. 426. Mantic. de coniect. vlt. vol. lib. 3. tit. 19. n. 11.

o) Mascard. de probac. concl. 1280. n. 145. qui hoc distinctionis fœdere contrarias opiniones concilari putat.

Seuenthly, if the legatarie did neglect to minister necessarie helpe to the testator in time of his sickenesse, when as he might easily haue done the same, through the want whereof the testator died, the legacie is lost[p]: For who so looketh to be benefited by a mans death, hee ought to beware that he be not the occasion thereof, either in committing, or in omitting any thing, contrarie to the rule of pietie and charitie[q].

p) L. indignũ. ff. de his quibus vt indignis.

q) Mantic. d. tit 5. n. 10. Mascard. d. concl. 1280. n. 134. 135.

Eightly, if the legatarie by iniurious and contumelious wordes doo grieuously defame and slaunder the testator, or curse him with wicked speeches: In these and such like cases the legacie is lost[r].

r) L. si inimicitiæ. ff. de his quibus vt indignis. Mantic. d. tit. 5. n. 11. quem velim te videre.

The † limitations of the former conclusion are these: First, when the enimitie is not great and grieuous, but small and light[s]: for the testator is not presumed to haue altered or reuoked any part of his will and testament, made with deliberation and constancie, by reason of any

s) L. 1. § vlt. de adimen. leg. L. si inimicitiæ. de his quibus vt indig. ff.

light offence, or ſmall diſpleaſure: But then when as the teſtator is mooued and ſtirred, as it were with violence of great diſpleaſure, and thereby driuen to ſuch bitterneſſe of minde againſt the legatarie, that it may ſeeme that it repented the teſtator that he had bequeathed any thing in his teſtament to ſuch a legatarie[t].

t)Mantic d.tit.5.n.14. Zaſ Tract.de ſub.c.2. col.pen.Iaſ.in L.ſi filiam.C. de inoffic. teſta.

Secondly, when the legacie is left in reſpect of the good deſert of the legatarie[v]: for where deſert went before, the legacie is not preſumed to be taken away by the offence following[x]; at the leaſt if the offence be not very great and heinous, ſuch as may be thought to alter a mans purpoſe, euen againſt him that had well deſerued[y].

v)Maſcard. de probac. concl.1280.n.147. Ripa.in L.vlt. C.de reuoc.don.n.150.

x)L.ſi pater.§.pen.ff.de donac.Bald. in L. ſi cũ tibi ff.de dolo. Mantic. d.tit.5.n.17.

y)Mantic.vbi ſupra. vide Maſcard.d. concl. 1280.n.148.

Thirdly, when the teſtator and legatarie be reconciled and reduced into friendſhip againe, for then the former enimities do not preiudice the legatarie[z]: Not onely by reaſon of enimitie betwixt the teſtator and the legatarie, during the teſtators life; but alſo by other occaſions after the teſtators death, conſiderable likewiſe in the perſon of the legatarie, the legacie may bee loſt.

z)L.4.de adimẽ.leg. ff. Graſſ.Theſau.com.op. §.legatum.q 73.Maſc. d.concluſ.1280.n.149.

If the †legatarie being appointed tutor in the teſtament, or charged by the teſtator with the bringing vp of ſome childe, do refuſe to vndergoe the charge, he loſeth his legacie[a]: which concluſion proceedeth whether he were appointed tutor, either in the ſame teſtamẽt wherin the legacie is conteined, or in ſome codicill, the legacie being conteined in the teſtament[b], or whether he were appointed by the father of 6

a)L.poſt legatũ.verb. amittere ff.de his quibus.vt indignis.

b)L.Neſenſius iuncta L.ſeq.de excuſ.tut.ff.

the

the childe, or by any other hauing authoritie to appoint a tutor[c], (of whom we haue ſpoken before[d]) or whether the legacie were left conditionally, (viz. if he did vndertake the tutorſhip) or ſimply[e], or whether the tutor appointed be of kin or allied to the teſtator or no[f]. But the ſaid concluſion faileth, when the legatarie would be tutor, but cannot[g], or when it doth not ſtand by the legatarie, that he is not admitted tutor[h]: or if by other circumſtances it may appeare that the teſtator would that he ſhould haue the legacie, albeit he did not vndertake the tutorſhip: In which caſe the tutor not being moniſhed to vndertake the tutorſhip, dooth not looſe his legacie[i].

7 Item, if† the legatarie after the death of the teſtator, doo *accuſe the teſtament, as a falſe teſtament*, he looſeth his legacie therin bequeathed[k], vnles hee being tutor to the teſtators children, or to ſome other hauing intereſt, that the teſtament ſhould not take place, doth proſecute the cauſe againſt the teſtament, not in his owne name, but as tutor, or for the behoofe of the pupill[l], or vnleſſe he accuſe the teſtament, not as a falſe teſtament, but as vnlawfully made[m], or vnleſſe he deſiſt from the ſute before ſentence be giuen[n]: In theſe and diuers like caſes he doth not preiudice himſelfe.

8 Item, if† the legatarie *cancell or deſtroy the teſtament*, he looſeth his legacie[o]; & ſo it is, though

c) d. L. Neſenſius. L. naturali. de confir. tut. ff. & ibi Bar. L. ſi patronus. eod. tit. & ibi Bald.

d) Supra 3. part. § 9. & ſequen.

e) L. ſed hæc. ff. de excuſ. tut. Gribald. Theſaur. com. op. verb. tutor.

f) Gribald. d. verb. tutor Bar. Iaſ. Sichard. & alij, in L. ſi legatarius. C. de lega. Et iſta opinio communis eſt iure Authent. p § his omnibus de hæred. & falcid. refragante Couar. in c. Iohannes de teſta. extra. ſed diſtingue, vt per Alex. & alios. in d. L. ſi legatarius.

g) DD. in d. L. ſi legatarius. C. de lega.

h) L. cum filius. §. non iure. de leg. 2 ff.

i) Alex. & Sichard. in d. L. ſi legatarius. C. de lega.

k) L. poſt legatũ. de his quibus vt indig. ff.

l) L. tutorem. ff. de his quib. vt indig.

m) L. pen. eod. tit. Ætiologia eſt, quia non tã iudicium defuncti impugnat, quàm de iure diſputat.

n) Sichard. in Rub. de his quibus vt indignis. C. n. 7. per L. 2. & per L. aliã cauſam. eod. tit.

o) Doctores in c. ex eo. de reg. iur. 6. Gabr. lib. com. concluſ. lib. 6. tit. de reg. iur. concluſ. 1. Vigel. method. iur. ciuil. lib. 12. c. 8. cauſa 17. (p) L. ſi quis cum falſo. §. diuus. L. ſi quis patris. Ad. L. Cornel. de falſis. ff.

light offence, or ſmall diſpleaſure: But then when as the teſtator is mooued and ſtirred, as it were with violence of great diſpleaſure, and thereby driuen to ſuch bitterneſſe of minde againſt the legatarie, that it may ſeeme that it repented the teſtator that he had bequeathed any thing in his teſtament to ſuch a legatarie[t].

t) Mantic d.tit.5.n.14. Zaſ Tract.de ſub.c.2. col.pen.Iaſ.in L.ſi filiam.C. de inoffic. teſta.

Secondly, when the legacie is left in reſpect of the good deſert of the legatarie[v]: for where deſert went before, the legacie is not preſumed to be taken away by the offence following[x]; at the leaſt if the offence be not very great and heinous, ſuch as may be thought to alter a mans purpoſe, euen againſt him that had well deſerued[y].

v) Maſcard. de probac. concl.1280.n.147. Ripa.in L.vlt. C.de reuoc.don.n.150.

x) L.ſi pater.§.pen.ff.de donac. Bald. in L. ſi cũ tibi ff.de dolo. Mantic. d.tit.5.n.17.

y) Mantic.vbi ſupra. vide Maſcard.d. concl. 1280.n.148.

Thirdly, when the teſtator and legatarie be reconciled and reduced into friendſhip againe, for then the former enimities do not preiudice the legatarie[z]: Not onely by reaſon of enimitie betwixt the teſtator and the legatarie, during the teſtators life; but alſo by other occaſions after the teſtators death, conſiderable likewiſe in the perſon of the legatarie, the legacie may bee loſt.

z) L.4.de adimẽ. leg. ff. Graſſ. Theſau.com.op. §.legatum.q 73. Maſc. d.concluſ.1280.n.149.

If the † legatarie being appointed tutor in the teſtament, or charged by the teſtator with the bringing vp of ſome childe, do refuſe to vndergoe the charge, he loſeth his legacie[a]: which concluſion proceedeth whether he were appointed tutor, either in the ſame teſtamẽt wherin the legacie is conteined, or in ſome codicill, the legacie being conteined in the teſtament[b], or whether he were appointed by the father of 6

a) L. poſt legatũ. verb. amittere ff.de his quibus.vt indignis.

b) L. Nefenſius iuncta L.ſeq.de excuſ.tut.ff.

the

the childe, or by any other hauing authoritie to appoint a tutor [c], (of whom we haue ſpoken before [d]) or whether the legacie were left conditionally, (viz. if he did vndertake the tutorſhip) or ſimply [e], or whether the tutor appointed be of kin or allied to the teſtator or no [f]. But the ſaid concluſion faileth, when the legatarie would be tutor, but cannot [g], or when it doth not ſtand by the legatarie, that he is not admitted tutor [h]: or if by other circumſtances it may appeare that the teſtator would that he ſhould haue the legacie, albeit he did not vndertake the tutorſhip: In which caſe the tutor not being moniſhed to vndertake the tutorſhip, dooth not looſe his legacie [i].

7 Item, if † the legatarie after the death of the teſtator, doo *accuſe the teſtament, as a falſe teſtament*, he looſeth his legacie therin bequeathed [k], vnles hee being tutor to the teſtators children, or to ſome other hauing intereſt, that the teſtament ſhould not take place, doth proſecute the cauſe againſt the teſtament, not in his owne name, but as tutor, or for the behoofe of the pupill [l], or vnleſſe he accuſe the teſtament, not as a falſe teſtament, but as vnlawfully made [m], or vnleſſe he deſiſt from the ſute before ſentence be giuen [n]: In theſe and diuers like caſes he doth not preiudice himſelfe.

8 Item, if † the legatarie *cancell or deſtroy the teſtament*, he looſeth his legacie [o]; & ſo it is, though

c) d. L. Neſenſius. L. naturali. de confir. tut. ff. & ibi Bar. L. ſi patronus. eod. tit. & ibi Bald.

d) Supra 3. part. § 9. & ſequen.

e) L. ſed hæc. ff. de excuſ. tut. Gribald. Theſaur. com. op. verb. tutor.

f) Gribald. d. verb. tutor Bar. Iaſ. Sichard. & alij, in L. ſi legatarius. C. de lega. Et iſta opinio communis eſt iure Authent. p § his omnibus de hæred. & falcid. refragante Couar. in c. Iohannes de teſta. extra. ſed diſtingue, vt per Alex. & alios. in d. L. ſi legatarius.

g) DD. in d. L. ſi legatarius. C. de lega.

h) L. cum filius. §. non iure. de leg. 2 ff.

i) Alex. & Sichard. in d. L. ſi legatarius. C. de lega.

k) L. poſt legatũ. de his quibus vt indig. ff.

l) L. tutorem. ff. de his quib. vt indig.

m) L. pen. cod. tit. Ætiologia eſt, quia non tã iudicium defuncti impugnat, quàm de iure diſputat.

n) Sichard. in Rub. de his quibus vt indignis. C. n. 7. per L 2. & per L. aliã cauſam. eod. tit.

o) Doctores in c. ex eo. de reg. iur. 6. Gabr lib com concluſ. lib. 6. tit. de reg. iur. concluſ. 1. Vigel. method. iur. ciuil. lib. 12. c. 8. cauſa 17. (p) L ſi quis cum falſo. §. diuus. L. ſi quis patris. Ad. L. Cornel. de falſis. ff.

he do not deface the testament, but maliciously and fraudulently conceale the same[q].

q)L. si legatarius. C. de legat.

Item, if † the legatarie *of his owne authoritie, without the consent of the executor, do apprehend and occupie the legacie* to him bequeathed, he looseth his right and interest thereunto[r]: For he may not be his own caruer in this case, but ought to receiue his legacie at the handes of the executor[s]: which executor ought first to haue all the testators goods and cattels in his hands, for the paiment and discharge of the testators debts[t]: which debts ought to be paied before legacies[v]. 9

r)L. 1. quorum legatorum. ff. L. non dubium. C. de lega.

s)Sichard. in d. L. non dubium. Perkins tit. testament. fol. 94.

t)Old. de actione class. 2. action. 2 fol. 112. Perkins. vbi supra. Castrē. & Sichard in d L. non dubium. assignantes aliam rationem, nempè ob detractionem falcidiæ.

v)L. scimus. C. de iure delib. Paul. de Castro. in d. L. non dubium. Brook Abridg. tit. deuise. n. 6.

The † limitations of this former conclusion are these: First when the testator doth in his testament giue licence to the legatarie to take and occupie the same, without deliuerie of the executor[x]; which licence may be granted either expresly or secretly[y]: expresly, when the testator saith, I bequeath my horse to A.B. giuing him licence to take him, and to possesse him of his owne authoritie, without any deliuerie to be made by my executor[z]: Secretly, when the testator saith, I bequeath vnto him my horse, which I will that he quietly enioy without trouble or molestation[a]; or by words of like importance[b]. 10

x)Bar. in L. Titia. §. Lucius. de leg. 2. Rip. in L. 1. quorum lega. ff. Sich. in d. L. non dubium. C. de lega.

y)Sichard. in d. L. non dubium. Ripa. in d. L. 1.

z)Sichard. in d. L. non dubium. n. 11.

a)Sichard. in d. L. non dubium. n. 12.

The second limitation is, when the legatarie was in quiet possession of the thing bequeathed, at the time of the death of the testator: In which case if there be sufficient goodes to pay the testators debts, he may still retaine the legacie[c].

b)Ripa. in d. L. 1. ff. quorum lega. n. 10. 11. 12 13. 14.

c)Socin consil. 11. lib. 1. Ripa. in d. L. 1. n. 15. Olden. de action. class. 2. action. 2. fol. 113.

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The third limitation is, when the executor dooth willingly permit the legatarie, to take and occupie the legacie without contradiction [d].

The fourth limitation is, when the legatarie dooth apprehend his legacie, before the executor haue prooued the will, and vndertaken the executorſhip [e], or before adminiſtration be graunted [f].

The fift limitation is, when the executor is negligent, and the legacie like to periſh, as when certaine fruites or corne on the ground are giuen, and the ſame readie for reaping [g].

The ſixt limitation is, when the legatarie is ignorant, that the thing by him apprehended and poſſeſſed, was bequeathed vnto him [h].

The ſeuenth limitation is, when the legatarie is alſo executor [i]. In theſe and other caſes the legatarie dooth not looſe his legacie [k]: albeit (if neede be) he may be compelled to reſtore the ſame [l].

d) L. 1. §. prodeſt. ff. quorum leg.

e) Paul. de Caſtr. in d. L. non dubium. Ratio eſt, quia vacante hæreditate, legatarius non dicitur vitioſe occupare.

f) Forte tamē cenſuris eccleſiaſticis puniendus eſt. per Legatin. vnic. de bonis inteſtatorum.

g) Iaſ. in d. L. non dubium. in fin.

h) Sichard. in eand. L. non dubium. n. 1.

i) Sichard. ibi. n. 13.

k) Old. de action. claſſ. 2. action. interdicti quod legatorū. fol. 109.

l) d. L. 1. quorum legatorum, & ibi Zaſ. & Rip. d. L. non dubium. & ibi Iaſ. & Sichard.

Of the death of the legatarie before the legacie be due.

1 *If the legatarie die before the legacie be due, the legacie is extinguiſhed.*

2 *A ſimple legacie beginneth to be due at the death of the teſtator.*

3 *What if the legatarie die at the ſame inſtant when the teſtator dieth.*

4 *If the prince die before the teſtator, his ſucceſſors may obtaine the legacie.*

5 *A conditionall legacie is not due before the condition be extant.*

6 *If the legatarie die before the condition bee extant the legacie is not transferred to his executors.*

7 *Extensions of this former conclusion.*

8 *Limitations of the same conclusion.*

9 *If the legacie be referred to a certaine day, whether it beginne to bee due at the death of the testator.*

10 *When the day is vtterly vncertaine, the legacie is as if it were conditionall.*

11 *What if the day be certaine in some respects, and vncertaine in other respects.*

§. xxiij.

IF the † legatarie die before the legacie be due, the legacie is extinguished[a]. That we may know when the legacie is due, we are to consider, whether the same be *pure and simple*, or *conditionall*, or referred to *a day*[b]. 1

When † the legacie is *pure and simple*, the day wherein the legacie beginneth to be due, is the day of the death of the testator[c], and therfore if the legatarie die before that day, the legacie is voide: neither can the executors or administrators of the legatarie demaunde the same[d]. And † so it is although the legatarie liue as long as the testator: for if he doo not ouerliue the testator, but that they die both at one instant (both peraduenture being drowned together, or both being stroke to death at once with the 2 3

a) L. si post. ff. quando dies. leg. ced.

b) Gloss. in Rub. de cond. & demon. ff. Grass. Thesaur. co. op. §. legatum. q. 43. in prin

c) L. vnic. § cum igitur. & §. in nouissime. C. de cad. tollend.

d) d. L. vnic. §. cum triplici.

the fall of an house:) In this case also the legacie is not due [c], and consequently, not transmissible to the executors or administrators of the legatarie. But if the legatarie do ouerliue the testator, though it be but a verie little, euen a moment, then the legacie is due [f], and so may be recouered by the executors or administrators of the legatarie [g]: neither is it materiall whether the legatarie did know, or were ignorant [h] of the legacie, or whether the will were proued, or the administration of the goods committed, whiles the legatary liued [i]: for in this case alsothe same is due to his executors or administrators.

4 Howbeit † theformer conclusion, that if the legatarie die before the testator, the legacie is extinguished, doth not proceed where any thing is bequeathed to the prince: for though the prince die before the testator, yet the legacie is due to the princes successor [k].

5 When † the legacie is *condicionall*, the day wherein the legacie beginneth to be due, is the day wherein the condition is performed or ex-

6 tant [l]: and therefore † the rule is, that the legatarie dying in the mean while, before the condition bee extant, the legacie is extinguished [m]: which rule † is extended although the legatarie were one of the testators children [n]. Item, although the condition were referred to the will of the legatarie: Example; The testator giueth to A.B. an hundred pound if he will: for in this case also, if the legatarie die before he haue declared himselfe willing, the legacie is extinguished [o], and so nothing is due to his executors or admi-

c) L. quod ff. de reb. dub.

f) Castrens. in d. L. quod de Tiraquel. de iudic. in reb. exig. lim. 3. nec longè abest Ias. L. si quis. C. de Instit. & subst. n. 5.

g) L. si post diem. ff. quando dies. leg. ced.

h) L. vlt. quãdo dies. leg ced. ff.

i) L. vnic. §. sin autem C. de cad. tollend.

k) L. quod principi. ff. de leg. 2.

l) L. vnic. § sin autem. C. de cad. tol. Bar. in L. si post. ff. quando dies. leg. ced.

m) L. intercidit. ff. de cond. & demon. & Bar. in d. L. si post diem.

n) Glos. in L. vnic. de his qui ante aper. tab. C. Vasq. de succes. progress. lib. 3. §. 29. n. 19. quæ opinio communis est, vt latiùs per Mantic. de coniect. vlt. vol. lib. 11. tit. 20. n. 1.

o) L. si ita. §. si illi de leg. 1 ff.

administrators. likewise, if the cõdition be alternatiue, whereof one part is simple, and the other conditionall, if the legatarie die before the condition be extant, the legacie is vtterly void[p]: For example; the testator dooth bequeath to A.B. all his plate, or if his wife haue a childe, an hundred pound: albeit A.B. doo ouerliue the testator, but die before his wife haue a childe, the executors or administrators of the legatarie can neither obtaine the hundred pound, nor the plate[q].

Limitations of this former rule are many[r]: First, when it is the testators will and meaning, that the conditionall legacie be transmitted[s]. 8

Secondly, when it dooth not stand by the legatarie wherefore the condition is not performed, and in that respect the condition is reputed for accomplished[t].

Thirdly, when the legacy is not conditional, but modall[v], (of which difference we haue spoken before[x].)

Fourthly, when the legacie which was first conditionall, is afterwards repeated without any condition[y].

Fiftly, when the testator dooth giue the legacie vpon condition afterwards to be expressed, but expresseth none[z].

Finally, whersoeuer the condition dooth not make the legacie conditionall (either because it is secretly included[a] in the disposition, or reiected[b]) it doth not hinder the transmission of the legacie to the executors or administrators of the legatarie deceased, no more then if it were

p) L. cum illud. ff. quãdo dies. leg. ced.

q) DD. in d. L. cũ illud. Ætiologia est, quia in alternatiuis nõ sunt duo legata, sed vnum.

r) Vigel. method. iur. ciuil. part. 4. lib. 13. c. 7. except. 2.

s) Vasq de succes. progress. lib. 2. §. 18. n. 94. lib. 3. §. 29. n. 16 Bar. in L. si is cui. §. hoc autem de leg. 1 in fin.

t) c. cum non stat. de reg. iur. 6. plenius supra part. 4. §. 8.

v) L. cum tale. ff. de cond. & demon.

x) Supra part. 4. §. 9.

y) L. non ad ea. ff. de cond. & demon. et Castrens. ibid.

z) L. pen. C. de Instit. & sub.

a) L. si dies. §. vlt ff. quãdo dies leg. ced. Manti. de coniect. vlt. vol. lib. 12. tit. 20. n. 5.

b) L. conditiones. de condic. Instit ff. §. impossibilis Instit. de hæ. red. instit. & supra §§. 4. & 5.] art. 4.

were a ſimple and pure legacie.

9 When †the legacie is *referred to a day*, then it skilleth whether the day be *altogether certaine*, or *altogether vncertaine*, or in *ſome reſpect certaine, and in other reſpects vncertaine.*

In the firſt caſe, that is to ſay, *when the day is certaine*, the legacie beginneth to be due at the time of the death of the teſtator, although it can not be demaunded effectually before the day doo come[c]. And therefore if after the death of the teſtator, the legatarie die alſo before the day of payment, the legacie is tranſmitted to the executors or adminiſtrators of the legatarie, as if it had bene a pure and ſimple legacie[d]: For example; the teſtator dooth bequeath to A.B. an hundred pound at Eaſter, anno domini 1600, and afterwards dieth, and after him the legatarie dieth alſo before Eaſter anno 1600: In this caſe the executors or adminiſtrators of the legatarie, at Eaſter 1600. may demaund and recouer the legacie, becauſe the time is vndoubtedly certaine (in the reputation of lawe) aſwell in reſpect of the queſtion *when*, as in reſpect of the queſtion *whether*[e].

c) L. cedere diem. de verb. ſig. ff. & ibi Alciat. & Rebuff.

d) L. ſi dies. ff. quando dies lega. ced.

e) DD. in d. L. ſi dies. & in L. ſi poſt diem. ff. quãdo dies leg. ced. Graſſ. Theſaur. cõ. op. §. legatũ. q. 43. n. 3-4. f.

10 In the ſecond caſe, that is to ſay, *when* † *the day is vtterly vncertaine*, the legacie is compared to a conditionall legacie[f]: and therefore if the legatarie die in the meane time, the legacie is loſt without hope of deuolution thereof, to the executors or adminiſtrators of the legatarie deceaſed[g]: For example; The teſtator ſaith: I do bequeath to A. B. an hundred pound when he ſhall be maried: or thus; I bequeath to A.B.

f) L. dies incertus. ff. de cond. & demon.

g) L. vnic. §. fin autem. C. de cad. toll.

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an hundred pound to be paied when he shall be maried: here the day is vtterly vncertaine: for neither is it certaine *when*, neither yet *whether* the legatarie shall marie before the euent: and therefore if the legatarie die before he be married, his executors or administrators haue no action or right to demaunde the legacie[h]: neither is it material, whether the day be ioined to the substance of the legacie, as in the former example, or to the execution thereof, as in the second example: for it is not deuolued neither in the one case, nor in the other[i].

In the third case, that is to say, when † the day is *partly certaine, and partly vncertaine*, we are to distinguish, whether the vncertainty be in respect of the question *whether*, or of the question *when*. 11

If the vncertaintie be in respect of the question *whether*, not of the question *when*: as if the testator do bequeath an hundred pound, when his sonne shall come to the age of xxi. yeares, (for here it is certaine when he shall be of that age, but vncertaine whether he shall liue till he come to that age:) In this case we must yet againe distinguish: for either the time is ioined to the substance of the disposition, as when the testator saith; I giue to A.B. an hundred pound when he commeth to the age of xxi. yeares, and the legacie is not deuolued to his executors or administrators, if he die in the meane time[k] (except in certaine cases elsewhere before specified[l];) or else the day is ioyned to the execution or performance of the legacie: as when the

h) DD. in d. §. sin autē.

i) Bar. in L. si cui. §. hoc autem de leg 1. post glos. in L. Seius. ad Trebel. ff. & Alex. ibid. Mantic. de coniect. vlt. vol. lib. 11 tit. 20 n. 3. & est communis opinio, teste Gras. Thesaur. com. op. § legatum. q. 43. n. 7.

k) Bar. in d. L. si cui. §. hoc autem. de leg. 1. L. si Titio. in prin. quādo dies. leg. ced. ff. Vasq. de succes. progres. lib. 3 §. 29. n. 3.

l) Supra part. 4. §. 17. sub fine.

the teſtator dooth bequeath to A. B. an hundred pound, which he willeth to be paid when the legatarie ſhall be of the age of xxi. yeares, and then the legatarie dying in the meane time, his executors or adminiſtrators may recouer the legacie, when the time is expired that the legatarie ſhould haue beene of the age of xxi. yeares if he had liued [m].

If the vncertaintie be not in reſpect of the queſtion *whether*, but of the queſtion *when*, as if the teſtator do bequeath to A.B. an C. pound, when the executor of the teſtator ſhall die, or to be paied when the ſaide executor ſhall die. For here it is certaine whether the executor muſt die (we muſt all die) but when hee muſt die it is vncertaine: In this caſe the legacie is not tranſmitted, the legatarie dying before the executor of the teſtator [n]: howbeit this legacie after anothers death, if it be duely conſidered, is not onely vncertaine, in reſpect of the queſtion *when*, but alſo in reſpect of the queſtion *whether* [o], becauſe it is vncertaine alſo whether the legatarie ſhal ouerliue the executor, not only when the executor ſhall die [p], as elſewhere hath beene declared [p].

m) L. ex his verbis. C. quando dies. leg. ced. Bar. & Paul. de Caſtr. in L. ſi cui. §. hoc autem ff. de leg. 1. Alex. in L. Seius ad Trebel. in fin. ff. Vaſq. de ſucceſſ. pgreſſ. lib. 3. §. 29. n. 3. verb. quandoque. & 3.

n) L. huiuſmodi. ff. quãdo dies. leg. ced. DD. in L. hæres meus. de con. & demon. Cæual. de vſufruct. mulier. n. 70. 71. quorũ opinio eſt magis recepta, vt per Graſſi. Theſaur. com. op. §. legatũ. q. 43. n. 8. Vaſq. de ſucceſſ. progreſſ. lib. 3. §. 27. n. 11.

o) d. L. hæres meus. de cond. & demon. ff.

p) Supra. part. 4. §. 17.

Of the deſtruction of the thing bequeathed.

1 *The legacie is extinguiſhed, if the thing bequeathed do periſh.*

2 *What if it periſh by the fact or negligence of the executor.*

3 *What*

3 *What if the legacie be generall, or doo consist in quantitie.*

4 *What if one thing of two things be bequeathed, whereof the one doth perish.*

5 *What if the thing bequeathed be not destroyed, but the forme thereof altered.*

§.xxiiij.

IF the † thing bequathed do perish or be destroied, the legacie is extinguished [a], and the legatarie destitute of remedie: For example; The testator doth bequeath vnto thee his best oxe, which oxe is afterwards killed: In this case the legacie is extinguished [b], insomuch that neither the skin, nor the flesh, nor the price, is due vnto thee [c]: which rule notwithstanding is limited in certaine cases. 1

First, when † the thing bequeathed dooth perish by the fact or negligence of the executor: as when the executor after the death of the testator, conuerteth the thing bequeathed to his owne proper vse [d], or when he maketh delay, in not paying or deliuering the thing bequeathed so soone as he may, after he haue vndertaken the executorship [e], or dooth vniustly deferre the prooving of the will, and vndertaking the executorship [f], and the thing bequeathed perish in the meane time: for then the legacie is not so extinguished, but that the legatarie may recouer the value thereof: albeit the thing it selfe be not extant [g]: And albeit peraduenture 2

a) §. si res legata. Instit. de lega.

b) L. mortuo boue. ff. de leg. 2.

c) d. §. si res legata. & ibi Minsing.

d) Gloss. in d. L. boue. & in L. lana. de leg. 3. ff.

e) L. omnia de leg. ff. Intellige si modo præcedat interpellatio, vel hominis, vel certæ diei. L. si ex legati causa. ff. de verb. ob. sed nõ sufficit mora irregularis, nempè quæ ex iuramẽto oritur. Cagnol in L. quod te. ff. si cer. pe. n. 97.

f) L. equis. ff. de vsur. & fruct.

g) Paul. de Castr. in L. seruum filij. §. si pocula. de leg. 1. L. senatus. eod. tit. Mantic. de cõiect. vlt. vol. lib. 9. tit. 12. n. 30.

aduenture it would haue periſhed likewiſe, if it had beene deliuered to the legatarie in due time[h].

3 Secondly, when † the legacie is generall, or conſiſteth in quantitie; as when the teſtator dooth bequeath a horſe, or an oxe (not this horſe, or that oxe:) or whē the teſtator doth bequeath certaine quarters of wheate, or other graine, not this or that graine lying in ſuch a barne or garner: this kinde of legacie cannot periſh, though all the teſtators cattell do periſh, and all his corne be conſumed[i]: and therefore the legatarie may recouer his legacie, vnleſſe ſome certaine thing were offered to the legatarie, which he without iuſt cauſe refuſed to take: for then if the ſame thing do periſh afterwards, the legacie is extinguiſhed[k].

4 Thirdly, when † one of two things is bequeathed alternatiuely; as if the teſtator doo bequeath his apparell, or his bookes, the one of theſe being conſumed, the other of them may be recouered[l], vnleſſe the election appertaining to the executor, he offred the one of them to the legatarie, which afterwards periſhed[m].

5 Fourthly †, when the thing bequeathed, wherof the former is altered, *may be reduced to his firſt matter*; as when the teſtator doth bequeath ſome maſſe of metall be it gold or ſiluer, tinne, or ſuch like, whereof the teſtator afterwardes dooth make ſome veſſell, or other inſtrument. Or on the cōtrarie, the teſtator hauing bequeathed a cuppe of golde, or other veſſell, or inſtrument of metall, dooth afterwardes diſſolue

h) Alex. Iaſ. & alij, in L. nemo de verb. ob. ff. quorum opinio eſt cōmunis, vt refert Iaſ. vbi ſupra. & Soarez lib. recept. ſententiarum. littera M. n 222. de qua ſententia tanto minùs dubitatur, quanto magis dubitatur an res apud legatarium peritura fuiſſet. Quod ſi manifeſtè conſtat rem eodem modo fuiſſe perituram apud legatarium, hic multi recedunt ab illo communi dogmate exiſtimantes æquiorem opinionem eſſe, vt non teneatur executor. Soarez vbi ſupra. Ripa. in L. ſi inſulam. de verb. ob. n. 97

i) L. incedium. C. ſi cer. pe. L. non amplius §. 1. de leg. 1. ff. Minſing. in §. ſi res legata. Inſtit. de lega. ff.

k) L. huiuſmodi. §. ſtichum. & §. ſi cui. de lega. 1. ff.

l) L. cum res. §. ſed ſi. de leg 1.

m) L. huiuſmodi. §. ſtichum. & §. ſi cui. de leg. 1. L. ſtatu liberum. §. vlt. de leg. 2. ff.

the same to his first matter: or the testator hauing bequeathed a cup of golde, dooth make a chaine thereof: the will of the testator by such alterations is not presumed to bee altered, and therefore the legacie is not thereby extinguished[n].

But if the thing bequeathed after the forme therof be altered, *cannot be reduced to that which it was before*; as wooll when it is made clothe; or timber, when it is hewen or made parcell of a ship: the testator hauing bequeathed certaine wooll or timber, and afterwards translating the same to other forms, from whence they cannot be reduced to the former, the legacie is extinguished[o], vnlesse it doo appeare that the will of the testator therein is not chaunged[p].

Other limitations there be of this rule, as also diuers other causes whereby legacies may be lost: But neither haue I conuenient leisure to proceede in the discourse thereof, neither do I thinke the same either so needfull or profitable to be knowen, as these wherof I haue made choise, and which I haue alredie deliuered. And therefore I thought good onely to referre such as are[q] farther studious in that point, and here cut off the threed of this testamentarie treatise.

FINIS.

n) Bar. Lancel. Dec. & alij, in L. seruum filij. §. si pocula. ff. de leg. 1. quorum opinio communiter approbatur, vt refert Ial. cod. §. n. 5.

o) L. Iana. ff. de leg. 3. Bar. Paul. de Castro. & alij communiter. in d. L. seruū filij. §. si pocula. de leg. 1.

p) d. §. si pocula.

q) De quibus plene Vigelius in sua methodo exactissima iuris ciuilis. lib. 12. c. 10. caus. 51. vbi enumerat 70. causas amittendi legata.

An Epilogue.

THus for thy loue (louing countrieman) haue I deliuered vnto the view of thy iudgement, the picture of my conceite concerning testaments, which if thou shalt beholde sharply, then I feare strongly, thou wilt espie in steed of iust proportion, lamenes, or want of some notable members; and in steed of delectable beautie, deformitie, or spots of soule and loathsome errors. Wherefore as at the first I did earnestly intreat for fauour; so now in the ende I do humbly begge for pardon. And although peraduenture I might vse some reasons to draw thee therunto, (as by giuing thee to vnderstand, First that all the lims and bones of this my testamentarie picture, were not onely heretofore out of ioint; but scattered and dispersed farre asunder, some amongst the lawes ciuil, some amongst the decrees and decretals, some amongst our prouinciall constitutions, and some amongst the lawes, statutes, and customes of this realme: and therefore the labour in searching and ioining of some of these dismembred members, to be rather thankfully accepted, than the not collecting of al to be accounted a fault. Secondly, that these manifolde lawes being so cõtrarie one to another, and the interpreters of euery seueral law being at euerlasting variance amõgst themselues about euery sentence, euery worde, and euerie letter almost; the blots and blemishes of the worke are so much the more tolerable, by how much the simple truth is often obscured and mistaken for error; and error (clothed in truthes garment) imbraced manie

times

times for truth it ſelfe, euen of the learned. And thirdly, that foraſmuch as no man hitherto ſince England *was* Albion, *hath ſet forth a perfect* Idea *of an Engliſh teſtator, or a right paterne of a lawfull teſtament within this land: The authour therefore in aduenturing to breake the yſe to make the paſſage eaſie for his countrymen, failing ſometimes of the fourd, and falling into the pit, may ſeeme worthie to be pitied, or at leaſt vnworthie to be reprehended in this interpriſe, no leſſe profitable for this common wealth, then it is vſuall to die:) Neuertheleſſe, becauſe it more tendeth to the aduauncement of thy commendation, to bee intreated then perſwaded, and more fitte for mine owne ſafetie to craue with humilitie, then proudly to chalenge that which may be denied: reiecting therfore theſe foreſaid reaſons, I do wholy ſubmit my ſelfe vnto thy courteſie, beſeeching thee to vſe me friendly, and either to pardon freely, or to admoniſh charitablie: ſo ſhall I haue iuſt cauſe to commend thy vertue and gladlie amend any fault committed.*

H. S.

Whereas there be ſundrie eſcapes in the print, I haue (for thy eaſe) cauſed thoſe of greater conſequence to be amended with a penne: the reſt I ſhal deſire thy ſelfe to amend, or to ſuſtaine without griefe.

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